

No. 13013

United States
Court of Appeals
for the Ninth Circuit.

THOMAS JONES,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska
Fourth Judicial Division

FILED

SEP 12 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

EVERETT W. HEPP,

Fairbanks, Alaska,

United States Attorney,

Attorney for Plaintiff & Appellee.

HUBERT A. GILBERT,

Fairbanks, Alaska,

Asst. United States Attorney,

Attorney for Plaintiff & Appellee.

GEORGE B. McNABB,

Fairbanks, Alaska,

Attorney for Defendant Kelly & Appellant.

WARREN A. TAYLOR,

Fairbanks, Alaska,

Attorney for Defendant Jones & Appellant.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 6681

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELL KELLY and THOMAS JONES,

Defendants.

COMPLAINT IN EJECTMENT

Comes now the United States of America, a sovereign, acting by and through Everett W. Hepp, United States Attorney, and Hubert A. Gilbert, Assistant United States Attorney, in and for the Fourth Judicial Division, Territory of Alaska, acting under instructions of the Attorney General of the United States, and for cause of action alleges:

I.

That the plaintiff is now, and for more than fifty (50) years last past has been, the owner in fee simple of the following described real property, situate in the Fairbanks Recording District, Fourth Division, Territory of Alaska, to wit:

NW $\frac{1}{4}$, Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, containing 160 acres;

and that said lands are embraced within a Withdrawal of Public Land in Aid of Flood Control, Alaska, by Executive Order No. 8020, dated December 2, 1938.

II.

That the plaintiff is entitled to the immediate possession of said lands; and that said defendants, Nell Kelly and Thomas Jones, have at all times since about the year 1942, unlawfully withheld, and do now unlawfully withhold, the possession of said lands from the said plaintiff.

Wherefore, the plaintiff demands judgment against the defendants, jointly and severally, for the recovery of the possession of said lands above described, together with the improvements thereon, for its costs and disbursements herein, and for a reasonable sum to be allowed by the Court as an attorneys' fee herein.

/s/ EVERETT W. HEPP,
United States Attorney.

/s/ HUBERT A. GILBERT,
Ass't United States Attorney.

[Endorsed]: Filed Jan. 9, 1951.

[Title of District Court and Cause.]

ANSWER

Comes Now Thomas Jones, one of the above-named defendants, and for answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Not having sufficient information upon which to

base a belief as to the allegations constained in paragraph 1, the defendant denies the same.

II.

The defendant denies each and every allegation of paragraph 2 of plaintiff's complaint.

Wherefore, defendant prays that plaintiff take nothing by its action.

/s/ WARREN A. TAYLOR,
Attorney for Defendants.

Service acknowledged.

[Endorsed]: Filed Feb. 23, 1951.

[Title of District Court and Cause.]

ANSWER

Comes Now Nell Kelly, one of the above-named defendants, and for answer to plaintiff's complaint,

I.

Denies each and every allegation contained in paragraph 1 of plaintiff's complaint.

II.

Denies each and every allegation contained in paragraph 2 of plaintiff's complaint.

Wherefore, Defendant Kelly prays plaintiff take nothing from its complaint; for her costs and dis-

bursements herein; and a reasonable sum as and for attorney fees.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant
Nell Kelly.

Service acknowledged.

[Endorsed]: Filed March 1, 1951.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now Thomas Jones, one of the above-named defendants, and for answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Not having sufficient information upon which to base a belief as to the allegations contained in paragraph 1, the defendant denies the same.

II.

The defendant denies each and every allegation of paragraph 2 of plaintiff's complaint.

And for an affirmative defense to plaintiff's complaint, defendant, Thomas Jones, alleges as follows:

I.

That upon the 4th day of March, 1948, defendant entered upon the said lands described in plaintiff's complaint, by virtue of the terms of a certain lease

to said lands executed by Nell Kelly, co-defendant in this action, which said lease was for a period of five years from March 4, 1948, to March 4, 1953, with an option to renew for a further period of five (5) years.

II.

That the defendant thereupon entered upon said lands and improved the said premises and expended the sum of approximately \$50,000.00 for said improvements.

III.

That at the time of the execution of said lease, defendant believed that the said Nell Kelly was the owner of and entitled to the possession of said lands and was in all respects qualified to execute a lease of said premises and the improvements on said lands at the time of the execution of said lease.

IV.

That in said lease the description of said premises was erroneously given as the

SW $\frac{1}{4}$ of Section 20, T 2 S, R 3 E, Fairbanks Meridian where the description should have been

SW $\frac{1}{4}$ of Section 27, T 2 S, R 3 E, Fairbanks Meridian.

V.

That defendant will suffer irreparable injury and loss by eviction from said premises for the improvements placed upon said premises are permanent in character and cannot be removed by this defendant.

Wherefore, having answered plaintiff's complaint,

defendant prays that the plaintiff's complaint be dismissed.

/s/ WARREN A. TAYLOR,
Attorney for Defendant
Thomas Jones.

United States of America,
Territory of Alaska—ss.

Thomas Jones, being first duly sworn upon his oath, deposes and says: That I am one of the defendants in the above-entitled action, that I have read the foregoing amended answer, know the contents thereof, and that the same are true as I verily believe.

/s/ THOMAS A. JONES.

Subscribed and Sworn to before me this 27th day of April, 1951.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public for the
Territory of Alaska.

My commission expires 8/11/51.

Lodged April 27, 1951.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause do from the law and the evidence therein find that at the time this action was commenced, to wit: January 9, 1951, and for many years theretofore and at all times thereafter the plaintiff was and is the owner in fee simple and entitled to the immediate possession of the property described in the complaint herein, to wit: NW $\frac{1}{4}$ Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, Alaska.

Dated at Fairbanks, Alaska this 27th day of April, 1951.

/s/ ERNEST JOHNSON,
Foreman.

Entered in Court Journal, No. 42, page 58, April 27, 1951.

[Endorsed]: Filed April 27, 1951.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6681

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELL KELLY and THOMAS JONES,

Defendants.

JUDGMENT

Be It Remembered, that upon the 23rd, 24th and 27th days of April, 1951, the above-entitled cause came on regularly for trial. The plaintiff appeared by its attorneys of record, and the defendants appeared in person and by their attorneys of record. Evidence was introduced and upon the 27th day of April, 1951, the jury returned its verdict in words and figures as follows:

“We, the jury, duly empanel and sworn to try the above-entitled cause do from the law and the evidence therein find that at the time this action was commenced, to wit: January 9, 1951, and for many years theretofore and at all times thereafter the plaintiff was and is the owner in fee simple and entitled to the immediate possession of the property described in the complaint herein, to wit: NW $\frac{1}{4}$ Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, Alaska.

“Dated at Fairbanks, Alaska this 27th day of April, 1951.

“/s/ ERNEST JOHNSON,
“Foreman.”

Wherefore, It Is Hereby Adjudged that the plaintiff, United States of America, is owner in fee simple and entitled to have and recover from said Nell Kelly and Thomas Jones, defendants, the immediate possession of the following described lands: NW $\frac{1}{4}$ Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, Alaska, including all improvements located thereon.

It Is Further Adjudged that the plaintiff recover from the defendants its costs and disbursements herein expended in the sum of \$67.18, to be taxed by the Clerk of the Court.

Dated at Fairbanks, Alaska, this 27th day of April, 1951.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal, No. 42, page 59, April 27, 1951.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Thomas Jones, one of the defendants above named, hereby appeals to the

United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 27th 1951.

/s/ WARREN A. TAYLOR,
Attorney for Appellant
Thomas Jones.

Service acknowledged.

[Endorsed]: Filed June 5, 1951.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: The Clerk of the District Court for the Territory of Alaska, Fourth Division.

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by the defendant, Thomas Jones, in the above-entitled cause, the complete record (including this designation) and all the proceedings and evidence in said cause, prepared and transmitted as required by law and by rules of said Court.

/s/ WARREN A. TAYLOR,
Attorney for Defendant
Thomas Jones.

Receipt of Copies acknowledged.

[Endorsed]: Filed June 13, 1951.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6681

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NELL KELLY and THOMAS JONES,
Defendants.

APPEARANCES

EVERETT W. HEPP,
United States Attorney,
Of Fairbanks, Alaska,
Attorney for Plaintiff.

HUBERT A. GILBERT,
Assistant United States Attorney,
Of Fairbanks, Alaska,
Attorney for Plaintiff.

GEORGE B. McNABB, JR.,
Of Fairbanks, Alaska,
Attorney for Defendant, Nell Kelly.

WARREN A. TAYLOR,
Of Fairbanks, Alaska,
Attorney for Defendant, Thomas A. Jones.

PROCEEDINGS

Be It Remembered, that upon the 23rd day of
April, 1951, at the hour of 10:00 o'clock a.m., the

trial of the above-named cause came on regularly for hearing, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: This was the time set for trial in the case of United States versus Kelly and Jones.

Mr. Gilbert: Yes, your Honor.

The Court: Defendants represented here?

Mr. Gilbert: Their attorneys are not here, your Honor.

The Court: Are you representing the defendants in this case, Mr. McNabb?

Mr. McNabb: I am representing Mrs. Kelly, your Honor, who has not put in an appearance.

The Court: Well, it was regularly set for trial.

Mr. McNabb: That's true, your Honor.

The Court: And how about the other defendant?

Mr. McNabb: Mr. Taylor is representing him, your Honor. I can find neither Mr. Taylor nor his client. He was here a few minutes ago. I was attempting to find Mr. Taylor.

The Court: He was around here, was he?

Mr. McNabb: Yes, your Honor, Mr. Taylor was.

The Court: Counsel ready to proceed and choose the jury in the case of United States versus [2*] Kelly and Jones?

Mr. Gilbert: Plaintiff is, your Honor.

* Page numbering stamped at top of page of original Reporter's Transcript.

The Court: Show the appearance of Mr. Taylor for Mr. Jones and Mr. McNabb for Mrs. Kelly. Put the names of the jurors in the box and draw a jury.

The Clerk: Box is full, your Honor.

The Court: Very well.

(At this time, Mr. Gilbert made a statement to the jury.)

(Mr. Gilbert and attorneys for the defendants proceeded at this time to impanel a jury.)

(A jury was duly empaneled and sworn.)

The Court: Swear the jurors in the box Proceed with your opening statements.

(Whereupon, Mr. Gilbert made his opening statement to the jury.)

(Mr. Taylor made an opening statement to the jury.)

The Court: In a moment, we will take a recess until three o'clock. That's one hour later than usual. We will take a recess until three.

The Clerk: Court is recessed until three o'clock.

(At 11:52 a.m., the trial of this cause [3] was recessed until 3 p.m.)

(At 3 o'clock p.m., April 23, 1951, the trial of this cause was resumed.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. McNabb: Ready, your Honor.

Mr. Gilbert: Ready, your Honor.

The Court: Very well.

Mr. Gilbert: May it please your Honor——

The Court: Mr. Gilbert.

Mr. Gilbert: I ask the court to take judicial notice that the United States of America has been the sovereign over the Territory of Alaska for more than 50 years last past and as such has made grants of land to citizens during that period, that it owns all lands in the Territory except that which has been conveyed under the laws of the United States.

The Court: Very well, the court will take judicial notice of that.

Mr. Gilbert: Mark this for identification. [4]

The Clerk: Plaintiff's identification number one.

(At this time, a photostatic copy of Executive Order Number 8020 was marked and identified as Plaintiff's Identification 1.)

Mr. Gilbert: May it please your Honor, the plaintiff offers in evidence as its exhibit "A," executive—a copy of executive order number 8020 which has been duly authenticated by the National Archives.

(Document handed to Mr. McNabb.)

Mr. McNabb: Your Honor, I object to the ad-

mission of that instrument at this time. There's no showing that it is material or relevant or has any bearing on the outcome of this case.

The Court: Objection overruled. May be admitted.

The Clerk: Plaintiff's exhibit "A."

(At this time, Plaintiff's Identification 1 was received into evidence and marked as Plaintiff's Exhibit "A.")

Mr. Gilbert: With the permission of the court, I will read this executive order.

The Court: Very well.

(Whereupon, Mr. Gilbert read the [5] exhibit to the jury.)

(Plaintiff's Exhibit "A" is as follows):

"38-3646

"Executive Order

"Withdrawal of Public Land in Aid of

"Flood Control

"Alaska

"By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, as amended by the act of August 24, 1912, c. 369, 37 Stat. 497, and subject to the conditions therein expressed, it is ordered that all public lands in the following-described areas in Alaska be, and they are hereby, temporarily withdrawn from settlement, location, sale, or entry, for flood-control purposes in connection with the Tanana River and Chena Slough flood-control pro-

ject under the supervision of the War Department as authorized by the act of June 28, 1938, 52, Stat. 1215:

“Fairbanks Meridian

“T. 2 S., R. 2 E., secs. 22 to 27, inclusive, 35 and 36,

“T. 3 S., R. 2 E., those parts of secs. 1, 2 and 12 east of Tanana River,

“T. 2 S., R. E., secs. 19 and 28 to 34, inclusive (unsurveyed),

“T. 3 S., R. 3 E., all east of Tanana River [6] (partly unsurveyed),

“T. 4 S., R. 3 E., secs. 1, 12 and 13,

“T. 3 S., R. 4 E., secs. 6, 7, 18, 19, 30 and 31 (unsurveyed),

“T. 4 S., R. 4 E., secs. 6, 7, 18 and 19, containing approximately 24,503.53 acres.

“This order shall continue in force until revoked by the President or by an act of Congress.

“/s/ FRANKLIN D. ROOSEVELT.

“The White House, December 2, 1938.

The National Archives
Filed and Made Available
for Public Inspection
Dec. 3, 11:32 A.M., '38,
In the Division of the
Federal Register.

“8020.”

Mr. Gilbert: May it please your Honor, at this time we would like to call Mr. Fred Weiler.

Mr. Hepp: Your Honor, we are informed that for about 5 minutes it would be very, very inconvenient for this witness to come. I wonder if we could ask for a 5 minute recess.

The Court: Take a recess until quarter [7] past three.

(At this time, a short recess was taken.)

The Court: Counsel stipulate all members of the jury are present?

Mr. McNabb: We will, your Honor.

Mr. Taylor: Yes, your Honor.

The Court: Very well. Ready to proceed?

Mr. McNabb: Yes, your Honor.

Mr. Gilbert: Ready. At this time, we would like to call Mr. Fred Weiler.

FRED J. WEILER

called as a witness in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gilbert:

Q. State your full name for the court please.

A. Fred J. Weiler.

Q. By whom are you employed, Mr. Weiler?

A. Bureau of Land Management, Department of Interior.

Q. And where are you stationed?

A. Fairbanks.

Q. What is the title of your position?

A. Manager, land office.

(Testimony of Fred J. Weiler.)

Q. Is that the Fairbanks land office? [8]

A. Yes.

Q. What are your duties as manager of the land office?

A. Well, the bureau is charged with the administration of the disposal of public lands and my particular duties are to oversee the office and to pass judgment on claims which are presented to us, to maintain the official records of land status, to receive and account for monies paid and received in payment for those lands.

Q. Do you know the defendants in this action, Nell Kelly and Thomas Jones?

A. I am acquainted with Mrs. Kelly. I don't know Mr. Jones.

Q. In your office, have you had any business dealings with Mrs. Nell Kelly? A. Yes.

Q. Tell the court the nature of those business dealings.

A. Well, it has been a considerable amount of business as I recall without consulting my records. Mrs. Kelly has been in on occasion for timber permits for instance. She has presently an application on file—an application for a tract of land located down the Alaska Highway and she also has on file an application for a tract of land located out the Richardson Highway, about 20 Mile, 22 Mile.

Q. Do you know if—what sort of a filing has Mrs. Kelly at about 22 Mile?

Mr. Taylor: If the Court please, the [9] filing

(Testimony of Fred J. Weiler.)

would be the best evidence. We object to the question.

The Court: Objection sustained.

Q. (By Mr. Gilbert): Are you familiar with the property known as Moose Creek lodge?

A. Yes, I have driven past it and seen it. I have been in it once or twice.

Q. Do you know who claims ownership of Moose Creek Lodge? A. Yes. Mrs. Kelly.

Q. Mrs. Nell Kelly? Do you know who occupies it now? A. I do not.

Q. Mr. Weiler, any record that you might have of Mrs. Kelly's filing down about 22 Mile, would it be available? A. For what purpose?

Q. For the court. A. Yes.

Q. How long would it take you to get that record for the court?

A. Well, there's—as I stated before, there would be a considerable amount of filing and (interrupted).

Q. Just pertaining to Mile 22?

A. Just as long as it takes me to walk up stairs. I'm sorry, may I amend that? It depends on what records you want, tract books, plats, case files (interrupted).

Q. The filing that Mrs. Kelly has made at 22 Mile. [10] A. A minute.

Mr. Hepp: (To witness.) One minute?

Mr. Gilbert: May it please your Honor, I ask leave of the court for this witness to run upstairs and get the records of that filing.

(Testimony of Fred J. Weiler.)

The Court: How long do you think it will take you?

The Witness: Just to walk upstairs and pick them up and bring them back down.

The Court: Go ahead.

(The witness left the witness stand and left the courtroom.)

(The witness entered the courtroom and resumed the witness stand.)

Q. (By Mr. Gilbert): Do your records show the history of this application, Mr. Weiler?

A. Yes.

Q. When was it first filed?

A. First document I have on this particular case here is filed March 29, 1948.

Q. What is that document?

A. It was an application to contest filed by one Robert H. Casperson.

Q. Now, is that contest by Nell Kelly or someone contesting (interrupted).

A. Someone contesting her claim to a tract of land located out on the Richardson Highway.

Q. What was the tract of land?

A. Described as the unsurveyed southwest quarter, section 27, township 2 south, range 3 east, of the Fairbanks meridian as recorded on page 552, volume 22, as instrument number 87034 in the record of the United States Commissioner and Records Office.

(Testimony of Fred J. Weiler.)

Q. When did Nell Kelly make the original filing on that piece of land?

A. May I make a little explanation?

Q. Yes.

A. The lands in question are unsurveyed and my office until very recently had no record of notices of claim filed for such lands. Such claims were initiated by actual settlement on the ground and notice of that settlement was recorded in the United States Commissioner's office. It was not until the applicant or settler actually applied for patent of the ground that I would have any official record of it and that might be 5 years, 10 years or 50 years in some cases.

Q. Do you know how long Nell Kelly by her own statements has claimed that piece of land?

A. During the winter of 1943.

Q. You mean she claimed—that's when she entered on this ground? [12]

A. Shall I read the statement?

Q. Yes.

A. During the winter of 1943, she erected a dwelling 30 by 20 feet and later made an addition to the said building.

The Court: Read a little slower please.

The Witness: I'm sorry. That was the statement I was referring to.

Q. (By Mr. Gilbert): Do you know if that has any relation to the property presently known as Moose Creek Lodge?

A. The case is in reference to the land on which Moose Creek Lodge is located.

(Testimony of Fred J. Weiler.)

Q. What is the number of the section immediately south of section 27 to which you have referred?

Mr. McNabb: I object to that. There's been no showing that there is any relationship between the two pieces of property, not material to the issues.

The Court: Objection overruled.

The Witness: I have to count up (interrupted).

The Court: Don't you have a map you can look at?

The Witness: Not right handy. It would be—section 34 would be immediately to the south of section 27.

Mr. Gilbert: I request this be marked [13] as plaintiff's identification.

The Clerk: Plaintiff's identification number two.

(At this time, a plat was marked for identification as Plaintiff's Identification Number 2.)

Q. (By Mr. Gilbert): Mr. Weiler, I hand you this plat which is marked as plaintiff's identification number 2 and ask you to tell the court what it is.

A. It is a diagram showing section 34, township 2 south, range 3 east of the Fairbanks meridian.

Q. And what is the section immediately north of that? A. Section 27.

Q. Is that the section 27 to which you have referred? A. It is.

Q. Does that map or plat or diagram show the location of Moose Creek Lodge? A. Yes.

Q. By whom was the plat made or compiled?

(Testimony of Fred J. Weiler.)

A. By our division of engineering of the Bureau of Land Management.

Mr. McNabb: I object to that question and move the answer be stricken, your Honor.

The Court: Objection overruled. Motion [14] denied.

Q. (By Mr. Gilbert): What are the duties of the Division of Engineering, Bureau of Land Management? A. Surveying.

Q. What type of surveying?

A. Cadastral surveying, land surveying that is, in rectangular survey system as used by the government.

Q. Will you state if you know who if anyone has authenticated that for the Division of Engineering?

A. Lyle F. Jones, Office Cadastral Engineer.

Q. Does his signature appear thereon?

A. It does.

Q. Have you ever seen the signature of Lyle F. Jones before? A. Yes, many times.

Q. Are you familiar with his signature?

A. I am.

Q. And that is his signature, you have stated, that appears on that plat?

A. To the best of my knowledge.

Q. Immediately above his signature, what writings appear thereon? A. Shall I read it?

Q. Yes.

A. This plat has been compiled by the Division of Engineering, Bureau of Land Management, at

(Testimony of Fred J. Weiler.)

Juneau, Alaska, from [15] information contained in our files and shows the location of the Moose Creek Lodge development as related to the preliminary field survey of section 34, township 2 south, range 3 east, Fairbanks meridian as executed in October, 1949, by cadastral engineer Lloyd Toland, of the Division of Engineering, Bureau of Land Management. Signed Lyle F. Jones, office cadastral engineer, February 6, 1951.

Q. And you have stated that Moose Creek Lodge appears thereon? A. It does.

Mr. Gilbert: May it please your Honor, at this time I offer in evidence this plat which has been testified to by this witness. It is plaintiff's identification number two.

(Document shown to Mr. McNabb.)

Mr. McNabb: Your Honor, I will object to this as being a sketch, not as a survey; that it isn't an original nor has it been certified to be true and correct, nor is there any showing as to the notes on the actual survey which was made, if one was made. This does not in itself represent to be the survey of any section. It states in the statement which appears on this document that it was made from information contained in the files of the office of the cadastral engineer and not notes which were prepared by the person who made the survey and at the time that the survey [16] was made. The map itself was prepared on the 6th day of February,

(Testimony of Fred J. Weiler.)

1951, which I believe, your Honor, was subsequent to the filing of the complaint in this action.

(Document was handed to the court.)

Mr. Gilbert: May it please your Honor, I would like to come forward with an offer of proof.

The Court: You have authorities, do you, to submit?

Mr. Gilbert: Yes, your Honor.

The Court: I will excuse the jury from the courtroom. Remain in the hall until called to return.

(At this time, the jury left the court.)

(Mr. Gilbert made a statement to the court.)

(Mr. McNabb made a statement to the court.)

(Mr. Gilbert further argued to the court.)

The Court: Well, of course the authority you read referred to an official survey. Well, that would mean a survey in connection with sectionizing the country. It wouldn't be a map that was made for just one law suit. This certificate of Mr. Jones appears to be an original certificate as far as that goes and in two places he has written on it, so I think it is an original as far as that goes even if it was a copy in the first place. Even if the map part was [17] a copy in the first place, the certificate is nevertheless original, but I don't consider this in the line of an official survey. This is merely a private survey of the government for the purposes of this particular suit. I think under those con-

(Testimony of Fred J. Weiler.)

ditions it has to be proved just the same as anyone else has to prove a map in court, by bringing in the surveyors and show the field notes they took and that they then made a map pursuant to those field notes. That being the case, I'll sustain the objection.

Mr. Gilbert: May it please your Honor, we have information that this surveyor was on loan to Alaska from in the States. We therefore ask leave of the court for a continuance to get him up from someplace in the States either from Idaho or one of the other western states where he is stationed.

The Court: Very well.

Mr. Gilbert: I would like to explain to the Court this is a section as we understand it—the township is not completed yet and there will be a township map whenever the survey of the entire township is completed.

Mr. McNabb: Your Honor, I feel obliged at this time to resist the motion for a continuance unless it can be shown that the surveyor can produce within—be produced here within a few days. My client, Mrs. Kelly, lives some 500 miles down the highway and has come in here [18] at an expense to herself and she cannot maintain herself in Fairbanks for any length of time.

The Court: Well, I'll have to set it for next fall. The next jury case will be October or November.

Mr. Gilbert: May I have until tomorrow morning then? I could know how soon I could get this surveyor in here or prove it otherwise.

(Testimony of Fred J. Weiler.)

The Court: Well, I will grant until tomorrow morning then, ten o'clock. Call the jury.

(The jury returned into the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. McNabb: Yes, your Honor.

Mr. Gilbert: Yes, your Honor.

(The Court duly admonished the jury and at 3:50 p.m. o'clock, the trial of this cause was adjourned until April 24, 1951 at ten o'clock a.m.)

Be It Remembered, that upon the 24th day of April, 1951, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, plaintiff and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court [19] proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: What is the status of the case?

Mr. Hepp: Your Honor, we've got an office full of engineers and surveyors down the other end of the hall. I have talked with Mr. Taylor and Mr. McNabb. We would like leave of this Court to go down—that is—discuss this matter with Mr. Taylor and Mr. McNabb and I think half an hour would do it. If the Court would give us that, we may

possibly avoid a considerable amount of time in so doing. We are ready to go. We just had these engineers come in and we would like to discuss this with Mr. McNabb and Mr. Taylor.

The Court: And you think—— (interrupted).

Mr. Hepp: I believe half an hour possibly will do it. Mr. Taylor states that he is willing to go down and listen to what we have to offer. It would be very tedious to bring it out into Court. I feel convinced of it, your Honor. I might state to the Court that the surveyor of this other plat is in the states. We are unable to produce him at this time.

The Court: Well, I think we better give you a little more time. It always flies when you're talking about a subject. I think a quarter to eleven you would be [20] ready, or about that time?

Mr. Hepp: We are hopeful we can come to an agreement by that time.

The Court: Very well. The jury will be in recess until a quarter to eleven. The jury is excused until a quarter to eleven.

(At this time, a recess was taken.)

(At 11:00 o'clock a.m., the trial of this cause was resumed.)

The Court: We are going to take a recess in a few seconds until two o'clock this afternoon. Upon taking that recess, the jurors not engaged in the trial of this case will be excused until tomorrow morning at ten o'clock. The jurors engaged in the trial of this case will be excused until two

this afternoon. We will take the adjournment then.

The Clerk: Court is recessed until two o'clock.

(At 11:02 o'clock a.m., the trial of this cause was recessed until 2:00 o'clock p.m.)

(At 2:00 o'clock p.m., the trial of this cause was resumed.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, [21] your Honor.

The Court: Counsel ready to proceed with the trial of this case?

Mr. Hepp: Government's ready.

Mr. McNabb: Ready, your Honor.

The Court: Very well.

Mr. Hepp: Your Honor, the attorneys in this matter have been arguing back and forth concerning this location of Moose Creek Lodge and the evidence that is going to be necessary to show that, and we have been running periodically hot and cold and it seems to be cold now. I see no—I have no choice, your Honor, but to send a chainman out. That's going to take probably 6 hours to run from a designated point and I ask leave of the Court for some time—this has been an unexpected event. We thought that we had it made there for a while but we just can't come to an agreement, your Honor, and I might suggest to the Court that there's another case which the government is ready to present if your Honor will see fit to entertain

a motion to adjourn this cause until the other one can be heard and by that time, I am certain that the evidence will be in a proper form to offer to the Court.

The Court: When would you like to have this case continued? For a couple of days, until day after tomorrow? [22]

Mr. Hepp: Well, we have a reasonable expectation of concluding the case of *United States vs. Belcher*—that's the next case on the court's calendar—in one day. There is some small chance that it would run into a portion of the following day. If we could conclude it in one day, why I would ask for a continuance through tomorrow to go through the morning of the next day. Mr. Taylor is incidentally the attorney in the case that is set to follow.

The Court: Yes. The unfortunate thing is that I can't get the rest of the jury until tomorrow to start the *Belcher* case so I have to postpone this case. If you think you can be ready day after tomorrow, we can start the *Belcher* case tomorrow.

Mr. Hepp: I am confident we will be able to proceed day after tomorrow, your Honor.

The Court: Very well. Is that satisfactory to you, Mr. Taylor?

Mr. Taylor: That's satisfactory.

The Court: Very well. In a moment, we will recess this case until day after tomorrow. You will have to appear as prospective jurors in the case of *United States vs. Belcher*. Now, do you get that straight? You will have to appear tomorrow for this *Belcher* case and day after tomorrow you will take

this case up again. We will recess and I would like to see Mr. Green a moment after the recess. [23] The court will then be in recess until tomorrow at ten o'clock.

(At 2:05 o'clock p.m., the trial of this cause was recessed to follow the case of United States vs. Belcher.)

Be It Remembered, that upon the 27th day of April, 1951, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, the Honorable Harry E. Pratt, District Judge, presiding.

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: Any ex parte matters? Counsel ready to proceed with the trial of this case?

Mr. Gilbert: Yes, your Honor.

(At this time, Mr. Taylor and Mr. McNabb had discussion with the court under ex parte matters.)

The Court: Call your witness.

Mr. Gilbert: If it please your Honor, I believe at this time Mr. Weiler is still on the stand.

The Court: Yes.

FRED J. WEILER

having been previously [24] sworn, resumed the witness stand and testified as follows on direct examination:

Q. (By Mr. Gilbert): Mr. Weiler, to refresh our memories, I will ask you a few questions again. By whom are you employed?

A. Department of Interior, Bureau of Land Management.

Q. And what is the title of your office?

A. Manager, land office.

Q. What are your duties?

A. Maintain the records of the land office and maintain status of public lands, to accept and administer applications received, to receive and account for monies paid in rentals, royalties or fees for the public lands.

Q. Mr. Weiler, are you acquainted with your official records insofar as they pertain to the general area of about Mile 22 on the Richardson Highway from Fairbanks? A. I am.

Q. Are you also acquainted with the property known as Moose Creek Lodge? A. Yes.

Q. Is it in that general location?

Mr. McNabb: I object, your Honor, to any questions concerning any of the records. The records themselves are the best evidence.

The Court: There is no question about [25] records at this time, only whether he was acquainted with Moose Creek Lodge.

Mr. McNabb: I think he is trying to tie that up,

(Testimony of Fred J. Weiler.)

your Honor, and so the only method that this witness will have of knowing of the general location would be the location in reference to any records which he may have in the land office.

The Court: Objection overruled.

The Witness: Will you repeat the question please?

Mr. Gilbert: The reporter will read the question.

(The question was read to the witness by the reporter as follows:

Q. Is it in that general location?

The Witness: Yes.

Mr. Gilbert: I ask that this be marked government's identification number 3.

(At this time, a map of the Fairbanks Meridian, township 3 south, range 3 east was offered and marked as government's identification number 3.)

Q. (By Mr. Gilbert): Mr. Weiler, I hand you government's identification 3 and ask you to tell the court what it is.

A. It's the official plat of survey of township 3 south, range 3 east, Fairbanks Meridian. [26]

Q. Have you ever seen this plat or map before?

A. Yes.

Q. Where have you seen it before?

A. In my office. It's one of the permanent records of the land office.

Q. Does this plat bear the approval of any agency of the Federal Government?

(Testimony of Fred J. Weiler.)

Mr. McNabb: Your Honor, I object to that question. Approval of that map is no part of the issues of this case. There is proper method set out in the law for the verification of maps and records and whether it has been approved by any agency or any person has no bearing on the issues or admissibility of that map.

The Court: Objection overruled.

The Witness: Yes.

Q. (By Mr. Gilbert): By whom has the map been approved?

Mr. McNabb: Same objection, your Honor.

The Court: Same ruling.

The Witness: By the United States Supervisor of Surveys and by the Assistant Commissioner of the General Land Office, Department of the Interior.

Q. (By Mr. Gilbert): And you have stated that it is on file in your office as an official record, is that correct? [27]

A. That's correct.

Mr. Gilbert: May it please your Honor, I offer in evidence as plaintiff's exhibit this official map.

(Document shown to Mr. McNabb.)

Mr. McNabb: Your Honor, I am objecting to this map on the grounds that it is not an original. There is no showing where the original is or why it has not been produced. There is no one—this witness is not competent to testify as to the truthfulness or correctness of this instrument which is in itself a copy and on the further grounds that title 28,

(Testimony of Fred J. Weiler.)

section 672 of the Judicial Code states that copies of any records in the Bureau of Land Management authenticated by the seal and certified by the director thereof or when his office is vacated and so on, shall be admissible. Now, this instrument has not been certified by the Commissioner. It has been certified but this is a copy of a certificate. There is no seal on this instrument and I believe that it is therefore invalid. This instrument in itself is not an original and does not purport to be an original. As I say, there's no showing of the seal and section 34 is not set out, section 34 being the land which is the subject of this litigation. Section 34 is not shown in its entirety on this map and therefore the instrument is inadmissible.

The Court: What was your citation again?

Mr. McNabb: Title 28, section 672, [28] your Honor. A further ground that this witness is not competent to testify as to this instrument.

The Court: All right, may I see the proffered exhibit?

(Document handed to the Court.)

Mr. McNabb: I object to it further, your Honor, on the grounds it does not show the flood control area which is the subject of this litigation. Your Honor, I will also cite Wigmore, section 1680 for the court's consideration in this matter.

Mr. Gilbert: I offer to come forward with proof.

The Court: The section in the statute you read is where copies are used instead of originals. These

(Testimony of Fred J. Weiler.)

are originals. Objection overruled, may be admitted.

Mr. McNabb: I will except to that, your Honor.

The Clerk: Plaintiff's Exhibit "B."

(At this time, Plaintiff's Identification Number 3 was introduced into evidence and marked as Plaintiff's Exhibit "B.")

Q. (By Mr. Gilbert): Mr. Weiler, showing you Plaintiff's Exhibit "B," I ask you from this plat of what area are these surveys? [29]

Mr. McNabb: The map itself is the best evidence to that, your Honor. I'll object to that question.

The Court: Why isn't that a good objection?

Mr. Gilbert: May it please your Honor, I was asking the witness to read from the plat itself.

Mr. McNabb: Well (interrupted).

The Court: You can read anything and show it to the jury yourself.

Mr. Gilbert: From plaintiff's exhibit, if it please the Court, it is entitled township number 3 south, range number 3 east, of the Fairbanks Meridian, Alaska.

Q. (By Mr. Gilbert): Now, Mr. Weiler, I will ask you to look at plaintiff's exhibit and ask you from your knowledge of the public land survey system in connection with section 34, township 2 south, range 3 east, to tell the Court what section corners on this exhibit would be closest to the area I have mentioned?

Mr. McNabb: I object to that question, your

(Testimony of Fred J. Weiler.)

Honor, as not being within the issues of this case. The map itself is the best evidence and further for the ground that the question as framed is impossible to answer.

The Court: Objection overruled.

Mr. McNabb: It has no bearing on the [30] issues of this case.

The Witness: The corners closest to section 34, township 2 south, range 3 east on this plat would be the corner common to section 10, 11, 14 and 15; the corner common to section 9, 10, 15 and 16; the corner common to sections 3, 4, 9 and 10 and the corner common to section 4, 5, 8 and 9.

Q. (By Mr. Gilbert): Mr. Weiler, to make it a little clearer for the jury, could you tell us from the surveyed sections which direction—which corner of those surveyed sections would be closest?

Mr. McNabb: I object to that question as the map is the best evidence, your Honor.

The Court: Objection overruled.

The Witness: I don't quite understand your question.

Q. (By Mr. Gilbert): For example, I note on this map that a section 22 has been surveyed. Would the area I have mentioned be closest to the southeast corner of section 22?

Mr. McNabb: What area has he mentioned?

Mr. Gilbert: That's—may it please the Court, would you like me to repeat that?

The Witness: No, I understand (interrupted).

(Testimony of Fred J. Weiler.)

The Court: Which area are you speaking of?

Mr. Gilbert: I am speaking of section 34 of township 2 south, range 3 east.

The Witness: The corner closest (interrupted).

Mr. McNabb: I object to that as the map is the best evidence, your Honor.

The Court: Overruled.

The Witness: The corner closest to section 34, township 2 south, range 3 east would be the northeast corner of section 15, the northeast quarter—northeast corner of section 15, the northeast—the northwest and also southeast corner of section 9. That would be the same point. The northeast corner of section 9, the northeast corner of section 5 and the southeast corner of section 5 and northwest quarter of section 9, which would be the same point.

Mr. McNabb: I move that answer be stricken, your Honor, on the grounds that it has no connection, no bearing, on the issues of this case.

The Court: Motion denied.

Mr. Gilbert: No further questions.

Mr. McNabb: No questions.

(At this time, Mr. Fred J. Weiler left the witness stand.)

Mr. Gilbert: May it please the court, at this time, I call Bob Lyle. [32]

ROBERT E. LYLE

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gilbert:

Q. State your name for the Court please?

A. Robert Lyle.

Q. What is your occupation, Mr. Lyle?

A. Civil engineer.

Q. Now, what does the field of civil engineering include or allow (interrupted).

The Court: Make it a direct question. This is a preliminary question. You don't have to be so careful about not making it leading.

Q. (By Mr. Gilbert): You stated you're a civil engineer. What branches of civil engineering have you specialized in, if any?

A. Land surveying, structural building, general construction.

Q. When did you receive your professional education as a civil engineer?

A. Between 1927 and 1932.

Q. Where did you receive that professional education? A. At the University of Alaska.

Q. How long have you been engaged in this type of work?

A. Since my graduation in 1932. [33]

Q. By whom are you now employed?

A. Corps of Engineers.

Q. Where are you stationed?

A. At Ladd Field.

(Testimony of Robert E. Lyle.)

Q. Did you receive a call from the office of the United States Attorney, Fairbanks, Alaska on or about the 24th of April, 1951, requesting you to make a survey of the premises of Moose Creek Lodge showing its location according to meridian, township, range and section? A. Yes.

Q. Did you thereafter visit the Moose Creek Lodge—the locality of Moose Creek Lodge?

A. I did.

Q. And did you make certain measurements and observations in this area? A. Yes.

Q. What was used as a starting point in making these measurements and observations?

A. The northeast corner of section 9, township 3 south, range 3 east.

Q. I hand you Plaintiff's Exhibit "B" and ask you if you can locate that starting point on this map or plat?

A. Yes—how can I answer that sitting on the stand? It is indicated as a point on this plat.

Q. Now, did you find the corresponding point on the ground? [34] A. Yes, I did.

Q. And you stated that you started from that point? A. That's right.

The Court: What point was that?

Mr. Gilbert: The northeast.

The Court: What point?

The Witness: The northeast, your Honor of section 9.

The Court: Same township and range you mentioned before?

(Testimony of Robert E. Lyle.)

The Witness: Yeah, township 3 south, range 3 east.

Q. (By Mr. Gilbert): When did you make this visit?

A. I made the first visit the night before last in the evening and did the actual work yesterday.

Q. Based upon those measurements and observations, did you make a survey of Moose Creek Lodge?

Mr. McNabb: I object to that, your honor, on the grounds that no proper foundation has been laid for it and I request permission of the Court to ask a few additional questions—foundation questions.

Mr. Gilbert: I can re-state the question.

The Court: Very well, re-state it. [35]

Q. (By Mr. Gilbert): Where did you measure to and of what did you make a survey?

A. I measured (interrupted).

Mr. McNabb: I object to that question, your Honor, on the ground no foundation has been laid for it. He hasn't shown what he used or how he used it to know that he was at that particular point to which he states he started his survey.

The Court: Just tell what you did to make a survey of Moose Creek Lodge.

The Witness: I started at the northeast corner of section 9.

Mr. McNabb: And I want to know, your Honor, how he found that corner.

The Court: All right, tell how you found that.

The Witness: I found a brushed line directly

(Testimony of Robert E. Lyle.)

opposite Moose Creek Lodge and followed that line out for 2 miles and found the iron marker which is marked properly for the northeast corner of section 9.

Mr. McNabb: May I ask some questions, your Honor?

The Court: I think Mr. Gilbert can do—ask him at present. You can cross-examine later. [36]

Q. (By Mr. Gilbert): What was recorded on this iron marker?

A. May I refer to my note book on that?

The Court: Yes.

The Witness: The corner is a two-inch iron post approximately 8 inches above ground with a brass capping marked—it's a general land office marker—stamped township 3 south, range 3 east, section 4, section 3, section 9, section 10 and dated 1934.

Q. (By Mr. Gilbert): And from that corner or monument, you started? A. That's right.

Q. What did you do then after you found that corner?

A. Well, we had to (interrupted).

Mr. McNabb: I object to that on the grounds that there hasn't been any proper foundation laid.

The Court: Objection overruled.

The Witness: We had to locate a second point to determine our meridian and we proceeded a half mile south of this corner and found a quarter corner common to sections 9 and 10.

Q. (By Mr. Gilbert): I will hand you again

(Testimony of Robert E. Lyle.)

Plaintiff's Exhibit "B" and ask if you can point out that second location that you found.

A. The second location is in the intersection of this [37] quarter section line and the section line—intersection of the quarter intersection line on the east boundary of section 9.

Q. What did you do after that?

A. Well, we ran a traverse from starting at this northeast corner of section 9, ran over to the highway and up the highway to a monument (interrupted).

The Court: Just a minute.

The Witness: Beg pardon?

The Court: Start that over again.

The Witness: I will start back at the beginning. We started it at the northeast corner of section 9, ran a traverse out to the Richardson Highway and up the highway to a point which I knew to be approximately on a point which we were seeking and then by computation determined the exact point on the ground.

Mr. McNabb: I object to that and move the answer be stricken on the grounds that the answer has no bearing on the issues of this case, no proper foundation laid and it is stated he ran to a place which was approximate to something.

The Court: Motion denied.

Q. (By Mr. Gilbert): Who was with you when this work was being done?

Mr. McNabb: I object to that as not [38]

(Testimony of Robert E. Lyle.)

within the issues of the case and has no bearing on the case.

The Court: Overruled.

The Witness: Well, we had a kind of a large crew.

Mr. McNabb: I object to that. He can answer from his own memory.

The Court: Qualify the use of a memorandum, Mr. Gilbert.

Q. (By Mr. Gilbert): At the time you made these measurements and observations, did you note who the other members of your party were?

A. Yes, I did.

Q. Will you refer to those notes and tell us who the members of the party are?

Mr. McNabb: I object to that as there's no proper foundation laid. He didn't say he wrote them down.

The Court: Yes. Did you write them down at the time and put the names down?

The Witness: Yes.

The Court: Do you have your writing in your hand?

The Witness: Yes, I have.

The Court: All right, go ahead and answer it.

The Witness: M. Stutzman, R. Angstman, [39] J. Coughlin, L. Dewey, W. L. McPeak, T. Hazard, T. Reinilla, A. Rumsteter, C. Nielson, G. Hinch, J. Finnagan and R. Cummins.

Q. (By Mr. Gilbert): And you were the surveyor in charge of this party?

(Testimony of Robert E. Lyle.)

A. That's right.

Mr. McNabb: I move that all of those names be stricken from the record and have no bearing on this case, no part of the issues.

The Court: Motion denied.

Q. (By Mr. Gilbert): Now, Mr. Lyle, you stated that you ran a line up the Richardson Highway, is that correct? A That's correct.

Q. Did you locate any points on up there?

Mr. McNabb: I object to that question. There's no proper foundation laid, no showing it is relevant to the issues of this case; not shown it's material.

The Court: Objection overruled.

Mr. McNabb: Has no bearing on the issues.

The Witness: Yes. I used as a point a monument which had been established there by the Bureau of Land Management which—would you like me to draw it?

Mr. McNabb: I object to that as calling for a conclusion. [40]

The Court: Yes, draw it. Objection overruled.

The Witness: One of the points which I used (interrupted).

Mr. McNabb: I object to any testimony from those records.

The Court: Did you make records at the time of your actions in making that survey?

The Witness: Yes, I did.

The Court: You wrote them in that book?

The Witness: Yes, I did.

(Testimony of Robert E. Lyle.)

The Court: And it's all in your own handwriting?

The Witness: That's right.

The Court: And you wrote it at the time you made the survey?

The Witness: That's correct.

The Court: All the writings in that book are correct, are they?

The Witness: Yes, they are.

The Court: Objection overruled. Go ahead.

The Witness: This metal is a 3-inch galvanized iron pipe with a brass capping (interrupted).

Mr. McNabb: I object to this, your [41] Honor; no showing that this metal he's talking about has any bearing on the issues of this case.

The Court: Objection overruled.

The Witness: And it's marked witness corner, township 2 south, range 3 east, section 28, section 27, section 33, section 34 and dated 1949.

Q. (By Mr. Gilbert): As a result—after you had located this point, what did you do after that?

A. Then I had a definite position of this point in relation to the northeast corner of section 9 and then was able to determine the true position of the northwest corner of section 34.

Mr. McNabb: I object to that as calling for a conclusion, your Honor, no proper foundation has been laid for that question, no showing it is material to the issues involved.

The Court: Objection overruled.

Mr. McNabb: Not competent.

(Testimony of Robert E. Lyle.)

Q. (By Mr. Gilbert): After you located the northwest corner of section 34, what did you do?

A. I then located Moose Creek Lodge in relation to this northwest corner of section 34.

Q. Were you able to ascertain the distance of Moose Creek [42] Lodge—just a minute. I withdraw that. Where was Moose Creek Lodge?

Mr. McNabb: Now, I object to that as there's no proper foundation laid; no showing as to the—as to what he did, where he began, how he arrived at the particular location, an opinion; and on the grounds that the witness is not competent to testify. There has been no proper foundation laid.

The Court: Objection overruled.

The Witness: I forgot the question now.

Mr. Gilbert: Repeat the question.

(The question was read to the witness as follows by the reporter.)

Q. Were you able to ascertain the distance of Moose Creek Lodge—just a minute. I withdraw that. Where was Moose Creek Lodge?

The Witness: Moose Creek Lodge is located southeast of this corner. I have the exact distances on a map which I have with me.

Q. (By Mr. Gilbert): Oh, then you reduced all of these measurements and observations to writing at that time, did you? A. Yes, I did.

Q. Was that done from your notes?

A. Yes, it was.

Q. Do you have that map with you at this [43] time? A. Yes.

(Testimony of Robert E. Lyle.)

A. Yes.

Mr. Gilbert: Mark this as plaintiff's identification.

Clerk of the Court: Plaintiff's identification number four.

(At this time, a map was offered and marked as Plaintiff's Identification Number 4.)

Q. (By Mr. Gilbert): I hand you plaintiff's identification number 4 and ask you if this is—— (interrupted).

The Court: Wouldn't it be better to put that up on the board right now?

(At this time, the map was placed on a board in front of the jury.)

Q. (By Mr. Gilbert): Is plaintiff's identification 4 the map that you brought with you?

A. Yes.

Q. Now, will you show the court and the jury by pointing out on this map where you started and the final location by you of Moose Creek Lodge?

Mr. McNabb: I object to that question, your Honor, as no proper foundation has been laid for any testimony concerning this map.

The Court: Objection overruled. [44]

The Witness: I started at the northeast corner of section 9 which was at this point on the map (pointing), proceeded up the section line to a point which I called H-1; then northeasterly to a point which I call H-2 and again northeasterly to a point

(Testimony of Robert E. Lyle.)

on the Richardson Highway which I called H-3 and then up the highway to a point I called H-4; and then to the witness corner which I discussed previously. Then by computation, I was able to determine the relation of this witness corner to the northeasterly corner of section 9 and then to determine the relation of the witness corner to the northwest corner of section 34 and then on this other smaller—larger scale—reproduction—we have yet another point which I called H-6 between H-4 and H-3 and then set another additional point H-7 over close to the Moose Creek Lodge and then from H-7 determined the position of 3 corners of Moose Creek Lodge. Then by computation I determined that the northwest corner of Moose Creek Lodge lies—— (interrupted).

Mr. McNabb: I object to any further testimony on that score, your Honor, until such time as this witness shows us how he arrived at this particular computation. He stated that he points and then he makes computations. No proper foundation laid for any further testimony.

The Court: Very well. You can state what your method was of computation.

The Witness: Well, I would be glad to go [45] into it in great detail if you wish—unlimited detail.

Mr. Gilbert: If the court wishes, I believe we can go through his notes and give the coordinates in each and every case.

The Witness: Precisely what I did was compute the coordinates of each of these points. I

(Testimony of Robert E. Lyle.)

started and assigned a coordinate value at the north-easterly corner of section 9 of 10,000 north and 10,000 east and then I computed the coordinates of the northwest corner of the Moose Creek Lodge and then I arrived at a distance south from the section line of 1181.70 feet. That is from the northwest corner of Moose Creek Lodge to the north boundary of section 34, a distance of 812.86 feet from the northwest corner of Moose Creek Lodge to the west boundary of section 34.

Mr. McNabb: I object to the statement of figures and move they be stricken until such time that he can testify how he arrived at those particular figures.

The Court: Objection overruled.

Q. (By Mr. Gilbert): Are you testifying from the figures on the map?

A. Yes, I am. I wrote them on there from my calculation sheets. I have my calculation sheets here if you wish me to read the whole thing.

Mr. McNabb: Did you make those figures at the same time? [46]

Mr. Gilbert: I object, your Honor.

Mr. McNabb: Well, there hasn't been any proper foundation laid, your Honor, for his testimony as to what's on that map.

The Court: Very well, then. Your objection is overruled. Proceed.

The Witness: To whose question?

The Court: Mr. McNabb's question—objection is overruled. Proceed.

(Testimony of Robert E. Lyle.)

Q. (By Mr. Gilbert): Now, you have stated that from your computations which you have reduced to this map that the premises of Moose Creek Lodge is how many feet south of the north line of section 34? A. 1181.70.

Q. And what was the measurement from the east line of section 4—34, west line?

A. It is 812.86.

Q. Did you observe the buildings of Moose Creek Lodge on the general premises there?

Mr. McNabb: I object to that question, your Honor. What he observed isn't material.

The Court: Objection overruled.

Mr. McNabb: It has no bearing on this case.

The Court: Go ahead and answer. [47]

The Witness: Yes, I did observe several buildings besides the lodge itself.

Mr. McNabb: Now I object to that and move the answer be stricken as not responsive to the question.

The Court: Motion denied.

Q. (By Mr. Gilbert): From these observations and measurements that you have made, will you tell this court and jury in what portion of section 34 does Moose Creek Lodge and its buildings lie?

Mr. McNabb: I object to that on the grounds it calls for an opinion, no proper foundation laid, nothing to show it is material to the issues involved in this case, no showing that this witness is competent to testify and no showing that there's ever been any proper foundation laid for the question.

(Testimony of Robert E. Lyle.)

The Court: Objection overruled.

The Witness: Moose Creek Lodge lies in the northwest quarter of section 34.

Mr. Gilbert: Your witness—oh, just a minute.

Q. (By Mr. Gilbert): Now what range, township and meridian are you referring to in connection with section 34?

A. Township 2 south, range 3 east.

Q. What meridian? [48]

A. Fairbanks Meridian.

Mr. Gilbert: Your witness.

The Court: Just a minute. How did you arrive at those distances?

The Witness: Which distance was that?

The Court: Any distance that you took in making that survey and map.

The Witness: The distances between the transit stations were lined up by chaining with a steel tape.

The Court: A chain? Very well.

Cross-Examination

By Mr. McNabb:

Q. Mr. Lyle, when you started initially, you said that you went out and found a line from which the brush had been cut and then followed it for 2 miles about to a corner? A. That's right.

Q. Now then, did you use a map to determine primarily where that line—to determine this line from which the brush had been cut? Did you use a map to determine that to show you where you—to show you where it started?

(Testimony of Robert E. Lyle.)

A. No, I had no map of anything north of section 9.

Q. Well, I know now, but do you have a map on which it shows this line which you initially started from and followed to a corner section? [49]

A. No, I don't.

Q. From whence did you get the knowledge of this particular line?

A. I talked to the man in the District Attorney's office, Casperson I think his name is. He told me there was a brushed line there and a witness corner and I was able to locate it when I went out there.

Q. So you used Casperson's opinion to start this survey?

A. Well, I found on checking, his opinion was facts and not an opinion.

Q. You didn't use any map which was purported to be an official map or any other written document or drawing in connection—— (interrupted).

A. I think you're probably referring to a map which the District Attorney has in his possession. I saw it here the day I was in the office but I didn't use it to locate the corners.

Q. What instruments did you use other than the steel tape which you have previously testified to in making these—— (interrupted).

A. Transits.

Q. By whom are you employed?

A. By the Corps of Engineers.

Q. And that is an agency of the United States Government?

A. That's right.

(Testimony of Robert E. Lyle.)

Q. And you work where? [50]

A. I work at Ladd. I am based at Ladd. I work for John E. England, the Resident Engineer, A.P.O. 731.

Q. And you're stationed at Ladd Field?

A. I am on temporary duty at Murphy Dome. My base is Ladd Field.

Q. Did you make any effort to determine whether or not the starting point from your—for your subsequent survey and measurement was in fact correct?

A. No. I went down and found the pipe. It had four pits. One pit north, one south, one west and one east which is a standard mark for a section corner where there are no bearing trees available and I went half a mile south and found the quarter corner for the common sections 9 and 10 which is properly monumented by 2 bearing trees.

Q. When was that initial stake put in there? I believe you said 1938, is that correct?

A. 1934.

Q. '34. How long have you been familiar with that particular location, Mr. Lyle?

A. First time I saw that stake was day before yesterday.

Q. So, you can't testify from your own knowledge that that stake has not been moved since it was placed there in 1934?

A. I can testify it has the standard pits which the land office puts at—— (interrupted).

Q. You can testify it has? [51] A. It has.

(Testimony of Robert E. Lyle.)

Q. It has been moved?

A. No, I didn't say it had been moved.

Q. I say, can you testify from your own knowledge?
A. I—— (interrupted).

The Court: Let him answer the question.

The Witness: I can testify that section 9, I mean the northeast corner of section 9 is a standard iron monument.

Q. (By Mr. McNabb): Yes, I know, but can you testify from your own knowledge that that particular stake has not been moved since the day which it was placed there in 1934?

A. I wasn't at the place—— (interrupted).

Q. You hadn't been at any time since it was placed there have you, except day before yesterday?

A. That's right.

Q. And you don't know whether it has been moved since it was initially put there, do you?

A. I know it has the standard—— (interrupted).

Mr. Hepp: I object. This witness should be allowed to answer these questions and explain his answers and counsel is taking a tone towards this witness that is purely argumentative and I object to it.

The Court: Objection sustained. [52]

The Witness: Can I testify? I can testify that the four pits which are standard to a section corner are there. I can also testify that the quarter corner—— (interrupted).

Mr. McNabb: Your Honor, I—— (interrupted).

The Court: He's answering your question.

(Testimony of Robert E. Lyle.)

The Witness: And I can testify that 2 bearing trees are at the quarter corner.

Q. (By Mr. McNabb): We are talking about one corner there, Mr. Lyle.

A. I know. They're tied together. If I find a quarter corner and half a mile south a point, there's every right to believe that is the right point.

Q. It is conceivable that the second stake could have been moved as well?

A. Not by the evidence on the ground. It is not conceivable.

Q. You mean, so long as you can make the Moose Creek Lodge within the particular area in which you had to find it, then you assume everything is correct?

Mr. Hepp: I object to that. It's an absurd question.

The Court: Objection sustained.

Q. (By Mr. McNabb): Now, did you check any calculations to determine whether or not that first stake was correctly placed? [53]

Mr. Hepp: I object to any further questions on that, your Honor. That is an established land marker of a survey—of an accepted survey and I don't think Mr. McNabb has a right to go into this.

The Court: Objection sustained.

Mr. Taylor: I would like to ask this witness a question, your Honor.

The Court: Very well.

Q. (By Mr. Taylor): Mr. Lyle, I believe you stated that after running your line down to the

(Testimony of Robert E. Lyle.)

northwest corner of section 34, you found what you designated a witness mark?

A. That's correct.

Q. And what was the writing or the inscription upon that witness marker? Will you read it to me again?

A. The stamping on the witness corner was township 2 south, range 3 east, section 33, section 34—wait a minute. I am on the wrong corner. I was giving the description of the meander corner. The witness corner is marked W. C., township 2 south, range 3 east, section 28, section 27, section 33, section 34 and dated 1949.

Q. Just the year date put on there?

A. That's right. It was never more than a year.

Q. Did you find in that vicinity any witness corner of official survey monument prior to [54] 1949?

A. None in the vicinity of this witness corner.

Q. And would you assume from that, that that corner was not established until 1949?

A. That's correct.

Q. I believe section 27 and 34 adjoin, do they not? A. That's correct; 27 is north of 34.

Q. And is there any section west of 34 that shows on that map?

A. Section 33 lies west of 34.

Q. Is that across the Tanana River?

A. I believe it extends across. It would come out and join the west boundary of 34.

Q. And what section is west of 27?

(Testimony of Robert E. Lyle.)

A. Section 28.

Q. Now, on that marker, Mr. Lyle, are there grooves cut across the marker to show the directions in which the section line runs?

A. The grooves are cut to show the exact point and normally they are authenticated to show the direction of the sections lines.

Q. By taking a line out of that marker, you would sight along the direction that is shown by the grooves—by the grooved lines?

A. That would be a very rough method of getting a direction.

Q. But I mean, it points in the same [55] direction.

A. That's correct.

Q. Now, when you run—you say that witness mark was the northwest corner of section 34?

A. No. The witness corner is not the northwest corner of section 34. All a witness corner is is a witness to the true corner. The true corner lies 198 feet north of the witness corner.

Q. And did you find the corner of section 34?

A. No, I did not. The corner is not set because it falls in the road.

Q. It is in the road? A. Yeah.

Q. Of the Richardson Highway?

A. That's correct.

Q. How many feet would you say that was from the true corner?

Mr. Hepp: I object to that unless counsel—
(interrupted).

(Testimony of Robert E. Lyle.)

Mr. Taylor: He just stated that he measured——
(interrupted).

Mr. Hepp: It is indefinite.

Mr. Taylor: I just asked it so I can make a note on it.

Mr. Hepp: Well, I'm just wondering what he's talking about. I didn't hear—— interrupted). [56]

The Court: Make it more definite, Mr. Taylor.

Mr. Taylor: The witness stated that this was a witness corner because the true corner was a certain distance from there and it was in the road and could not be permanently established. I was just asking how far the true corner was from the witness corner.

The Court: Very well.

The Witness: I will have to differentiate there if I may, between the true corner as I set it and as it—as the rough line is cut. That is, this—I didn't set this corner, you understand. I just used it as a traverse point. Now, by measuring up to the east and west line which was cut by the Bureau of Land Management, we arrived at a distance of 198 feet but I differed in distance by 1.6 feet from the land office.

Q. (By Mr. Taylor): About how much differential? A. 1.6 feet.

Q. Now, that line that you found cut there, Mr. Lyle, did that seem to be a fairly recent cutting of a survey line?

A. Yes, it was very recent and well brushed out.

Q. And would you believe that that line had

(Testimony of Robert E. Lyle.)

been brushed out about the time or since the witness corner was established there? [57]

A. It must have been brushed out prior to the establishing of the witness corner.

Q. How do you arrive at that conclusion, Mr. Lyle?

A. Well, the brushing normally precedes the measurement on a survey. I would like to find some way to reverse that, but I can't.

Q. How long do you think it would be preceding the establishment of the corner?

Mr. Hepp: I object to that, your Honor. I think that calls for a conclusion. It is not pertinent to the issues before this court. I don't think it is proper cross-examination. It goes into an entirely new matter.

The Court: Objection sustained.

Q. (By Mr. Taylor): Has there been much brush grown up in that line that had been cut out?

A. No, very little brush has grown up in there.

Q. One other question. You used some points that you would—traverse points that you would designate with an "H," H-1, H-2. What was that "H" designation?

A. I use that for huv. I use "H" as the initial of the word huv.

Mr. Taylor: That's all.

(Testimony of Robert E. Lyle.)

Redirect Examination

By Mr. Hepp:

Q. Now, Mr. Lyle, there has been quite a bit of talk here about witness corners and theoretical positions. In order to clear this matter up, I would like for you to state as a result of your measurements and your computations, do you now know where the northwest corner of section 34, township 2 south, range 3 east, Fairbanks meridian is?

A. I can state that I know it within the limit of about one in five thousand.

Q. You mean that would be one foot in five thousand feet?

A. That's correct. In going two miles then, I can state that the point which we determined would not be off 2 feet which would be about 1 foot per mile.

Q. It could be closer but it couldn't be more than that off, is that correct?

A. That's correct. It could be 2 feet north or south of the position we determined.

Q. Now, as to the Moose Creek Lodge premises, do they lay within 2 feet or within the margin of error that you have testified?

A. No. As I testified before, some 1100 feet from the north boundary to Moose Creek.

Q. Then if you were 2 feet off, that would be 1100 minus 2 feet or 1098 feet within the section?

A. Well, there would still be over 1100. It is

(Testimony of Robert E. Lyle.)

1100 plus [59] that they are south of the boundary. It would still be over 1100 feet south.

Q. And this point you can testify you have established by your computations? Any theoretical measurements were done merely to get a start from which to compute, is that right? I just would like you to make that point clear.

A. I don't quite get your question.

Q. You mentioned you used some theory and some witness points. Your final calculations are the basis of your measurements and computation, is that right?

A. That's correct.

Mr. Hepp: I see.

Mr. McNabb: Your Honor, I move that the testimony of this witness be stricken on the ground and for the reason that no proper foundation was laid for it. He made no effort to permanently establish the truth of the particular point to which he started.

The Court: Motion denied.

Mr. Taylor: Can we have a short recess, your Honor?

The Court: Take a 10 minute recess.

(At this time, a recess was taken.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Taylor: Yes, your Honor. [60]

Mr. Hepp: We so stipulate. I believe that the witness Lyle was on the stand. We have no further questions to ask of him. I believe—— (interrupted).

Mr. McNabb: We have no further questions.

The Court: Very well, then.

Mr. Hepp: Your Honor, at this time, I believe that the defendants are willing to stipulate that a substitution of an exhibit may be made of plaintiff's exhibit "B." They're exact copies which I believe counsel will so stipulate, plaintiff's exhibit "B" being these plats. These are original plats which unfortunately the land office is not allowed to leave get out of their possession and I am afraid Mr. Weiler will have to sleep here in court unless this substitution can be made. They're exact copies, your Honor. Will you so stipulate?

Mr. Taylor: I have no objection to Mr. Weiler taking the stand and testifying that those are true copies of the original map that is in his possession.

The Court: Call your witness then.

FRED J. WEILER

recalled as a witness in behalf of the plaintiff, having been previously sworn, testified as follows:

Redirect Examination

By Mr. Hepp: [61]

Q. Mr. Weiler—— (interrupted).

Mr. McNabb: Just a minute. Your Honor, at this time I am going to object to the admission of this exhibit on the grounds that there has been no showing of any authority to make this survey and on the further grounds that there are many additional lines and figures and so forth on this, on each of these instruments, to which there has not been a certificate made and I am not waiving the

(Testimony of Fred J. Weiler.)

question that these are not originals but that they are in fact copies.

Mr. Hepp: I am willing to limit this substitution just for one document for another and any limitation that counsel may desire to place against one can be placed against the other.

Q. (By Mr. Hepp): Mr. Weiler, I show you plaintiff's exhibit "B" and ask you to examine it please. I show you also what purports to be copies of that exhibit and ask you to examine them and state if you know whether they are the same or contain the same subject matter.

A. May I explain a little? They are not copies. They're prints.

Q. They are prints?

A. Taken from the plat. The information contained on them is identical with the information contained on the original.

Q. Those are identical? [62]

A. These two are in fact identical.

Q. By printing, you mean from the same initial recording device?

A. That's right, similar to a photostat.

Q. I see. That's a mechanical process, is it?

A. Yes.

Q. Then you can state then that those are identical insofar as subject matter that they contain?

A. Yes.

Mr. Hepp: I would like to ask—— (interrupted).

(Testimony of Fred J. Weiler.)

Mr. Taylor: Could I ask another question?

The Court: Yes.

Recross-Examination

By Mr. Taylor:

Q. Now, Mr. Lyle, are there any markings on the original exhibit which are not shown on the copies?

A. Yes, there would be one marking which is not shown on this copy. That would be the certificate; the plat was officially filed in the United States Land Office at 9 a.m. on September 20, 1938.

Q. There is no notations or markings appearing on the original that don't appear on the print?

A. Well, there are some figures in pencil and ink markings, [63] yes. Can I explain just a bit? These original copies which we have in our office are used to maintain status of the land. When someone comes in and applies for a tract of land, a homestead or timber permit, we make either a pencil or an ink notation on this original copy. Those, of course, would not appear on these, but the information in regard to the location of the lines, the coordinates, the bearings are all the same.

Q. To the sectional survey itself, the print is the same as the original?

A. Yes, Mr. Taylor.

The Court: Very well, may be substituted.

Mr. Hepp: We would like permission to withdraw then this original.

The Court: Yes, may be withdrawn.

(Testimony of Fred J. Weiler.)

Mr. Hepp: Mr. Clerk, will you make this substitution, please

(At this time, the original plaintiff's exhibit "B" was withdrawn and copies substituted.)

Mr. Hepp: I have no further questions to ask of this witness.

Mr. Taylor: No questions.

Mr. McNabb: Wait just a minute. Your Honor, to save time calling Mr. Weiler back at a later time, I wonder if we can use him as our witness at this time.

The Court: Yes. [64]

FRED J. WEILER

called as a witness in behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination

By Mr. McNabb:

Q. Mr. Weiler, you are familiar, you have testified, with the general location of Moose Creek property? A. Yes.

Q. To the best of your knowledge, has anyone ever filed an application for the particular ground upon which that location is located?

Mr. Hepp: Just a minute, Mr. Lyle. I object to this. There are no pleadings before this court that purport to set up any right, title or interest or right of possession to these grounds and it is not in

(Testimony of Fred J. Weiler.)

issue before this court as having not been pleaded by either of these defendants.

The Court: Objection sustained.

Q. (By Mr. McNabb): Mr. Weiler, to the best of your knowledge, is the location of the Moose Creek Lodge ever been established by any previous surveys?

Mr. Hepp: I am going to object to that as irrelevant and immaterial, has no bearing on this trial here. I don't think this witness is qualified to answer [65] that question anyway and there may be a purported establishment or something like that and a foundation has not been laid for that.

The Court: Objection overruled.

The Witness: Yes.

Q. (By Mr. McNabb): Are you familiar with who made that survey, Mr. Weiler? A. Yes.

Q. And when it was made?

A. Generally, yes. I couldn't give you the exact date.

Q. Do you know whether there was more than one survey made to determine the position of the Moose Creek Lodge property? A. Yes.

Q. Do you know why there was more than one survey made? A. Yes.

Q. Do you know who made all of the surveys?

Mr. Hepp: Now, I am going to object to any further talk about survey unless counsel defines what he means as a survey. People sometimes step off a distance and say they have surveyed it. There is no showing that these are surveys. I think cer-

(Testimony of Fred J. Weiler.)

tainly foundation questions are required in order to make this proposition clear.

The Court: Objection overruled.

The Witness: I know the person who made the—name of the person who made one of the surveys. I do [66] not know the name of the actual surveyor who made the other.

Q. (By Mr. McNabb): What is the name of the person whom you know made a survey there, Mr. Weiler? A. Lloyd Toland.

Q. What position does he occupy?

A. Cadestral engineer, Bureau of Land Management.

Q. Do you know of your own knowledge what he found to be the location of the Moose Creek Lodge?

Mr. Hepp: Just yes or no, please.

The Witness: Yes.

Q. (By Mr. McNabb): Does that location correspond to the location which has been determined by the survey made yesterday to which testimony was given in this court this morning?

Mr. Hepp: I object. Just a minute, Mr. Weiler. I object to that, your Honor, as irrelevant and immaterial. There was a survey attempted to be introduced at which time counsel objected which had Toland's name on it. I think if it is inadmissible to show one, it is inadmissible to show another. I object to any information concerning that survey upon the same grounds that counsel initially objected to it.

The Court: All right. I'll sustain the [67] objection.

(Testimony of Fred J. Weiler.)

Mr. McNabb: Your Honor, that — sustaining that objection would make this survey conclusive, would it not?

The Court: How's that? I can't understand you, Mr. McNabb.

Mr. McNabb: I say, if we are not able to introduce testimony tending to show that there has been surveys made which are different and established a different location than the one established here this morning, that would make this conclusive.

Mr. Hepp: Your Honor, in argument to that, I would like to state that I have no objection to introducing Mr. Toland or laying a proper foundation for that survey so that we can show if there is an error how it came about. But certainly, this witness is not qualified to discuss a survey that was made by someone else on the same grounds that it was initially objected to in this trial and I am going to object and I don't think—feel there is any conclusiveness of any survey established by this proposition. I am objecting to this because this witness is not qualified to speak or to answer concerning any possible error or discrepancy or how it came about.

The Court: Well, it would be an attempt to prove a survey by oral testimony. The survey itself or the plat would be the best evidence. [68]

Mr. McNabb: That's correct, your Honor. All I want to know is—of this witness who is the general manager of the land office, is if he knows of his own knowledge that surveys were made which

(Testimony of Fred J. Weiler.)

would establish a different location than the other one here.

The Court: You mean in a different section?

Mr. McNabb: Yes, sir, or show that there is only a portion of that property there within the section. We have a right to introduce testimony showing that.

The Court: The best evidence is the map itself.

Q. (By Mr. McNabb): Do you know whether maps were made each and every time that a survey was made of that property? A. Yes.

Q. Were such maps made? A. Yes.

Q. Now, Mr. Weiler, do you have those maps in your possession?

Mr. Hepp: I object to that, your Honor, unless he defines the maps as officially approved maps. I don't think they are proper evidence to show what they purport to show unless they are officially filed with the land office and approved by Washington. Those are the limitations which counsel placed on the government in attempting to show [69] a survey.

The Court: Objection overruled.

The Witness: I do not have them in my possession at the present time.

Q. (By Mr. McNabb): Have you had them in your possession, Mr. Weiler? A. I had.

Q. Is the location of Moose Creek Lodge shown on those maps? A. Yes.

Q. Do you know where those maps are, Mr. Weiler? A. Not definitely.

(Testimony of Fred J. Weiler.)

Q. Now Mr. Weiler, you are familiar with those maps, are you? A. Yes.

Q. And how many such maps are there?

A. Two.

Q. Are those maps—do those maps, Mr. Weiler, show an identical location of the Moose Creek property?

Mr. Hepp: I object to that question, your Honor. The maps are the best evidence as to what they show and I don't think this witness is qualified to answer that question.

The Court: You have not made any showing for the use of oral testimony in place of the map. Therefore, [70] you must introduce the map itself.

Q. (By Mr. McNabb): Mr. Weiler, do you know where those maps are?

A. Well, I think I know.

Q. Would you state to the best of your knowledge?

A. I think—I believe the District Attorney has one of them. The other one was filed in my office and may be there now. I would have to examine the case files or they may have been sent to Washington.

Mr. McNabb: Your Honor, if the District Attorney has in his possession a map which purports to show the location of the property in question here, I would request that be produced in court.

Mr. Hepp: In the first place, your Honor, I believe the court will find that is government's identification number two. In the second place, I object to any further discussion on this map unless

(Testimony of Fred J. Weiler.)

there is a foundation shown that it would be admissible as tending to show the location of any property or premises that are subject matter of this suit. I will offer that objection to every question that counsel has pertaining to that. I am willing on the court's order to produce that map. In fact, I don't have to. It's here already. I object to any further discussion on it unless the foundation questions are laid.

The Court: If it is already one of the [71] identifications, I will sustain the objection to oral testimony about it.

Q. (By Mr. McNabb): Mr. Weiler, are you acquainted with Lyle F. Jones? A. I am.

Q. What is his official position?

A. He is office cadestral engineer for the Division of Engineering, Bureau of Land Management.

Q. He is an employee of the United States Government, is he? A. That's correct.

Q. And what are his primary duties, if you know?

A. Just what the title implies. He is in charge of the office work of the cadestral engineering service, checking the work of surveyors, making up plats of survey from the field notes submitted by the surveyors, certifying as to correctness of the work done by those surveyors.

Q. Mr. Weiler, I hand you an instrument which is purported to be a map or plat. Do you know what that instrument purports to be?

(Testimony of Fred J. Weiler.)

A. Survey of section 34, township 2 south, range 3 east, Fairbanks meridian.

Q. Is Moose Creek Lodge property located on that plat? A. It is.

Q. Now, Mr. Weiler, I ask you to examine that instrument [72] and tell me if you can whether the location of the Moose Creek Lodge property from the east boundary and the north boundary is identical on this map with the one which you see here?

Mr. Hepp: Just a minute, Mr. Weiler. Now, I believe I am going to object to any—to that question, your Honor, inasmuch as this map is not in evidence. This witness is not qualified to express any information that is set forth in this map as to the exactness of a position.

The Court: May I see it?

(Document handed to Court.)

The Court: This is plaintiff's identification number 2 that you attempted to introduce, Mr. Hepp, is it?

Mr. Hepp: Yes, it is, your Honor.

The Court: The map shows the property to be the Moose Creek Lodge in the section alleged in the pleadings—in section 34. It is perfectly immaterial any of the details about any difference in the number of feet from one side or the number of feet from the other. I will sustain the objection.

Mr. McNabb: On the grounds that so long as it is in that section—— (interrupted.)

The Court: So long as it's in the section. That's the only point in question here. [73]

(Testimony of Fred J. Weiler.)

Mr. McNabb: Your Honor, if in fact the distances as shown by that particular map are different from those shown by the other—by the map which is now in evidence, this diagram here—it is my opinion that that will raise a presumption that somebody is not correct and it will very well be outside of this area entirely.

Mr. Hepp: Your Honor, in that respect, I'd like to state that I don't know whether there is a difference. They may be identical but I think that it's just as this other surveyor said. He explained the amount of error that could possibly come in and that's one in five thousand. There's a good chance the surveyor of this map if he made this would explain as to a possible error and that would explain away all possible discrepancy and place the issues of this—the land in issue before this court well within section 34 and I think it's prejudicial to go into a matter of error which may be in fact very insignificant but unexplained be a big issue.

The Court: I have sustained the objection to it on the evidence.

Q. (By Mr. McNabb): Mr. Weiler, as the representative or the officer in charge in the Fairbanks office of the Bureau of Land Management, I will ask you to search your memory and recall if you can whether you, in a conversation with Mrs. Nell Kelly, did [74] not tell her at one time that her lodge was only 6 feet within section 34?

Mr. Hepp: Now, I object to that as a leading question. This is counsel's witness. I don't think

(Testimony of Fred J. Weiler.)

that's a proper question on direct. I don't think it's proper and it's prejudicial.

The Court: Objection sustained.

Q. (By Mr. McNabb): How many talks have you had with Mrs. Kelly, Mr. Weiler, concerning the location of that property, Moose Creek Lodge property? A. Numerous.

Q. Have you ever discussed with her the particular location of the property?

Mr. Hepp: I object to that, immaterial and irrelevant to the issues before the court; has no bearing and counsel hasn't in his pleadings purported to set up any right, title or interest of Nell Kelly or anyone else in section 34 or any portion of it and I object to any discussions.

The Court: Objection sustained.

Q. (By Mr. McNabb): Mr. Weiler, has the Bureau of Land Management ever made an effort to have Mrs. Kelly removed from the Moose Creek property?

Mr. Hepp: I object to that, immaterial; [75] has no bearing on the issues before this court.

The Court: Objection sustained.

Q. (By Mr. McNabb): Mr. Weiler, has not the government on more than two occasions stated to Mrs. Kelly (interrupted).

Mr. Hepp: I object.

Mr. McNabb (Continuing): From your office (interrupted).

Mr. Hepp: Just a minute, Mr. McNabb. I object to counsel—to framing of this prejudicial question.

(Testimony of Fred J. Weiler.)

The Court: If you wish to come forward and make your offer, Mr. McNabb, I'll hear you.

(The following proceedings were had out of the presence and hearing of the jury.)

Mr. McNabb: I believe that we can show your Honor that there were various conversations between Mr. Weiler as the chief of the Office of the Bureau of Land Management in Fairbanks that there have been several conversations with Mrs. Kelly and that the position—the relevant position of the Moose Creek Lodge buildings has been changed over a period of years in statements to Mrs. Kelly—first showing that she was not within section 34; later that the building, the main building was only six feet within section 34 and that later that was moved—the line was theoretically moved over again to embrace a larger portion of the building and then [76] now that it is determined by this survey and others that it is substantially within section 34. I think we should have an opportunity to show this jury that this particular survey is not necessarily conclusive, that there have been other surveys made which indicate that the buildings are not within section 34.

Mr. Hepp: I object to that on the grounds—in the first place, that right, title or interest is not set up in this defendant through the pleadings—second place, that any survey that purported to show location of these grounds is offered into court as not under the best evidence rule and through

(Testimony of Fred J. Weiler.)

someone's memory and no showing that any of these surveys were official or were even made by a licensed surveyor or a graduated surveyor. I object to any showing. The best evidence (interrupted).

The Court: All right, objection sustained.

(The following proceedings were continued in the presence and hearing of the jury.)

Q. (By Mr. McNabb): Mr. Weiler, do you know how many surveys had been made by the United States Government or some person under the Bureau of Land Management which would indicate whether or not Moose Creek Lodge was within section 34?

Mr. Hepp: Your Honor, this question shows the same pattern (interrupted). [77]

The Court: It's the same thing. The objection is sustained to that line of questioning, Mr. McNabb.

Q. (By Mr. McNabb): Do you have in your office any maps which are purported to be the official survey of section 34 which we are discussing?

A. No.

Q. Did you ever have any maps other than the ones which are in this court, Mr. Weiler, which purported to show section 34?

Mr. Hepp: I object to that, your Honor, unless he shows what kind of a map he's talking about. I don't—a tracing or sketch might be considered by some to be a map. The question is very indefinite.

(Testimony of Fred J. Weiler.)

I think he should be confined to official surveys or otherwise to lay a foundation for some other kind of a map.

The Court: Objection sustained.

Q. (By Mr. McNabb): Do you have any official surveys in your office, Mr. Weiler, of section 34?

Mr. Hepp: I believe I am going to object to that until he states the township, range, and meridian. This land office may indeed have numerous section 34's. The question is indefinite.

Mr. McNabb: The section 34 which we are discussing, Mr. Weiler. [78]

Mr. Hepp: Add that to your question then, Mr. McNabb.

The Witness: That depends on what you mean by an official survey. A survey — the plats we brought in before would be the official survey of that township, range and sections as shown on there. The official—the word “official” there is used as a title. We make many titles which are official and recognized which do not have that particular title. The same difference between calling you Mr. McNabb or just McNabb. Mr. is the title. A survey would be official if it were made by any recognized surveyor or for any particular property, even though it might not be called “Mr. official” map.

Q. (By Mr. McNabb): Mr. Weiler, do you have or have you had any maps purporting to show this section 34 which we are discussing which was

(Testimony of Fred J. Weiler.)

made by an employee or an engineer of the Bureau of Land Management (interrupted). A. Yes.

Q. (Continuing): Who had authority to make such surveys and to make maps and plats from the notes and records which he kept and made at the time he was making a survey?

Mr. Hepp: I object to that question unless counsel defines what he means by authority. Authority can—to make a particular map is something different than [79] —and I might add to bind the government or any other party—is something different than the authority to go out and go over land and make a survey. I object to the question.

The Court: It seems to me it is very indefinite. If you think there is any map up in that land office that will do you any good, go up and get Mr. Weiler to show you what there is on the subject during the noon hour and bring it down here.

Mr. McNabb: Your Honor, Mr. Weiler stated a few moments ago that he had one and sent it to Washington.

The Witness: I may have. I am not certain of that.

The Court: We will—you can go up there and find out if there's anything there that does you any good. Bring it out and attempt to introduce it. If it's admissible, we will put it in.

Mr. McNabb: Very well, your Honor.

The Court: All right. Are you through with this witness otherwise?

Mr. McNabb: Yes, your Honor.

The Court: Well, we will take a recess then until 1:30. The jury is excused until two o'clock however.

(At 12 o'clock noon, the trial of this [80] cause was recessed until 2 o'clock p.m.)

(At two o'clock p.m., the trial of this cause was resumed.)

The Court: Call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll.)

The Clerk: They're all present, your Honor.

The Court: The calendars that were set for this afternoon will have to go over until the next calendar day, next Friday. Counsel ready to proceed with the trial of this case?

Mr. Gilbert: Ready, your Honor.

Mr. McNabb: Ready, your Honor.

The Court: Very well.

Mr. McNabb: May it please the court, Mr. Weiler has advised me that the only map which he has in his office discloses that the property in question here is in fact in section 34. The court having already ruled that any discrepancy in the measurements of the distances in that map and this one as not material to this action, I have no further questions to ask Mr. Weiler.

The Court: Very well.

Mr. Taylor: If the Court please, I would like to file an amended answer of the defendant, [81] Thomas Jones, in the present case. I have served

the United States Attorney with a copy of the answer.

The Court: May I see it?

(Document handed to court.)

Mr. Hepp: I would like to lodge a motion against this before your Honor finally considers this matter. After you have finished reading it, I would like an opportunity to talk.

The Court: Yes. (Pause.) Mr. Taylor, you wish to have the jury excused?

Mr. Hepp: I don't believe anything I have is prejudicial.

The Court: Very well. State your objection.

Mr. Hepp: I would like to ask the Court that if this amended answer be allowed, that the government be given an opportunity to strike all but paragraphs 1 and 2.

The Court: Are you objecting to the filing of the amendment?

Mr. Hepp: Well, I don't believe I have a right. A party can always file an amended pleading as I understand it, your Honor.

The Court: Well, they can if they state a defense, but I don't think this states a defense.

Mr. Hepp: That was my argument if [82] proved—if the issues were proved here, that it would constitute no lawful defense.

The Court: I'll deny the motion to amend. Anything further here?

Mr. Hepp: I believe that Mr. Weiler was on the stand and that counsel had received permission to

question him rather than calling him during his case.

The Court: He just stated he had no further testimony to put on, Mr. McNabb did.

Mr. Hepp: Oh! We will call Captain Jones then.

HARWELL H. JONES

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gilbert:

Q. State your full name to the court, please.

A. Harwell H. Jones, Captain, United States Air Force.

Q. Where are you stationed, Captain Jones?

A. At Eilson Air Force Base.

Q. Are you acquainted with the defendant in this case, Tommy Jones—Thomas Jones?

A. I know Mr. Tommy Jones, yes.

Q. Where did you meet Mr. Tommy Jones? [83]

A. I believe I met Mr. Jones at Moose Creek Lodge. The first time I met him I wouldn't be sure. It is possible I met him in the Provost Marshal's office at Eilson.

Q. Did you have any conversation with Mr. Thomas Jones the first time?

A. Yes, I believe I did.

Q. Do these conversations relate to Moose Creek Lodge in any way?

A. Not the first time that I met Mr. Jones. I

(Testimony of Harwell H. Jones.)

believe it was relative to the loss of some property that he told me about.

Q. Have you had any conversations with Mr. Thomas Jones regarding Moose Creek Lodge?

A. I have on several occasions, yes.

Q. Were any statements made regarding who occupied and operated Moose Creek Lodge?

A. I don't recall the specific statements. It was my opinion that (interrupted).

Mr. McNabb: Just a moment. Your Honor, we object to opinion evidence.

The Court: Objection sustained. You don't have to state it in exact words. It can be in substance. Do you have a substantial recollection of the conversation about the occupancy of that lodge?

The Witness: Your Honor, I don't know [84] whether we had any definite conversation relative to the occupancy of the lodge other than he was the proprietor of the lodge as represented to me.

Q. (By Mr. Gilbert): You stated as represented to you? Was Mr. Jones—Thomas Jones present when these representations were made?

A. I don't recall whether he was present when the representations was—were made. In a period of over 15 months it would be very hard for me to say.

Q. Have you had occasion to visit Mr. Thomas Jones at Moose Creek Lodge or other places?

A. Yes, on several occasions.

Q. Where did you visit him?

(Testimony of Harwell H. Jones.)

A. Well, I had been—I have visited him at Moose Creek Lodge.

Q. Once or more than once?

A. On several occasions.

Q. At the times you visited him, who was operating and occupying Moose Creek Lodge?

Mr. Taylor: Just a moment, Captain. We are going to object to the question, calling for a conclusion of the witness.

The Court: Objection sustained. You can show what acts Mr. Jones was taking which might throw light on who the occupant was—the owner of the lodge. [85]

Q. (By Mr. Gilbert): When you visited Mr. Jones at Moose Creek Lodge, what was he doing?

A. Well, I didn't observe him doing anything. He was present at the lodge. Possibly he was writing a letter or something at the time I walked in. I don't recall exactly what he was doing. He was present at the lodge.

Q. Did you ever have any conversation with Mr. Jones in regard to the operation of the lodge in your official capacity as an officer?

A. I did on several occasions.

Q. Tell the court what these conversations concerned?

Mr. Taylor: Just a moment, Captain. I am going to object until a proper foundation is laid as to conversations with the defendant Jones.

The Court: This is a strange situation. The complaint in this case says that Mr. Jones and Nell

(Testimony of Harwell H. Jones.)

Kelly unlawfully held and do now unlawfully withhold the possession of these lands. Now then, Mr. Jones has denied that altogether. Why not just dismiss the case at that if he has no interest in it? He says he has no interest in it at all, so why should he be allowed to take up time questioning here?

Mr. Gilbert: Well, may it please the court, we would like (interrupted).

The Court: Of course, you can call Mr. [86] Jones if you want to. Call him as a witness.

Mr. Gilbert: You mean Mr. Thomas Jones?

The Court: I beg your pardon?

Mr. Gilbert: You mean Mr. Thomas Jones, your Honor?

The Court: Yes, surely.

Mr. Taylor: I might say in that respect, your Honor, that is the reason I filed the amended answer for the reason that Tom Jones is—the allegation of paragraph two of the complaint says he is unlawfully withholding the lands described in here since 1942. I made an affirmative defense to that to show he is lawfully on the ground and he was there in good faith. That was the only reason for filing this amended answer, your Honor.

Mr. Gilbert: May it please your Honor, I would like to file a motion at this time out of the hearing of the jury.

The Court: Very well. The jury may retire in the hallway and remain there until called.

(Testimony of Harwell H. Jones.)

(At this time, the jury left the courtroom and the following proceedings were had out of the presence and hearing of the jury.)

Mr. Hepp: Your Honor, with some embarrassment, I would like leave of the court for a 15-minute recess. [87]

The Court: Very well.

Mr. Hepp: I know you're in a hurry to conclude this case.

The Court: We will take a 15-minute recess.

(At this time a recess was taken.)

(At the conclusion of the recess, the trial of this cause was resumed.)

Mr. Gilbert: We had contemplated at this time entering a motion but we have reconsidered and we would like to proceed in the presence of the jury with the questioning of Captain Harwell Jones.

The Court: Very well, call the jury.

(The jury reentered the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Gilbert: Yes, your Honor.

Mr. Taylor: Yes, your Honor.

The Court: Very well, proceed.

(Captain Harwell Jones resumed the witness stand and testified as follows.)

Q. (By Mr. Gilbert): Captain Jones, you have stated that you were stationed at Eilson Air Force

(Testimony of Harwell H. Jones.)

Base. What are your duties at Eilson Air Force Base? [88]

A. My duties are C.O. of the Air Police Squadron as Air Wing Provost Marshal.

Q. Now, as Air Wing Provost Marshal, have you ever had occasion to visit Moose Creek Lodge?

A. I have, sir.

Q. What was your reason for that visit?

A. As I recall, I went out there on one occasion to inform Mr. Jones to remove his slot machines from the lodge in accordance with the decisions of the station.

Q. Was that Mr. Thomas Jones to whom you have referred previously? A. Yes.

Q. Why did you give the notice to Mr. Jones?

Mr. Taylor: Just a moment. Your Honor, I am going to object to the question, calling for a conclusion of the witness. I think what he did is the best evidence.

The Court: Objection sustained.

Q. (By Mr. Gilbert): When you delivered the notice to Mr. Jones to remove the slot machines, was anyone else present in Moose Creek Lodge?

A. I believe there were several people present but I don't recall who they are.

Q. Did you give any of these other people notice to remove slot machines from the premises? [89]

A. I did not.

Q. You have stated you have had conversations with Mr. Jones prior to this time, is that correct?

A. Yes, sir.

(Testimony of Harwell H. Jones.)

Q. What did these conversations—well, first, I'll say: When, prior to the issuance of a notice to remove slot machines, did you talk to Mr. Thomas Jones?

Mr. Taylor: Just a moment, your Honor, I am going to object to the question upon the grounds there was no time set for the conversation in regard to the slot machines and makes it indefinite.

Mr. Gilbert: I will withdraw that question.

The Court: Very well.

Q. (By Mr. Gilbert): When did you give this notice to Mr. Jones to remove the slot machines?

A. I believe it was shortly after New Year's of 1951. It was in the early part of January, as I recall, of '51.

Q. Now, did you see Mr. Jones before this date?

A. Yes.

Q. In addition to this one time in January, 1951, did you ever have any conversations with Mr. Jones regarding the management of Moose Creek Lodge?

A. Yes. [90]

Q. Did you have these conversations on more than one occasion?

A. I don't believe so. I talked to him on one occasion about the management of the lodge.

Q. At any time, did he indicate who the manager of the lodge was?

Mr. Taylor: Just a moment, Captain. I am going to object to the question until it is shown that the conversation to which he is questioning was prior to the institution of the action of the United States of America versus Nell Kelly and Thomas

(Testimony of Harwell H. Jones.)

Jones, which the issuance of the summons showed it to be on the 9th day of January, 1951.

The Court: Objection overruled.

Q. (By Mr. Gilbert): Will you answer the question please?

A. I talked to Mr. Jones on one occasion relative to the sale of liquor in the bottle, that is, packaged liquor.

Q. Did he indicate who the manager of Moose Creek Lodge was?

Mr. Taylor: Just a moment. I am going to object to what Mr. Jones indicated. I think the statement of what Mr. Jones said in answer to a direct question by this witness (interrupted).

The Court: Objection sustained.

Q. (By Mr. Gilbert): Captain Jones, do you know who the manager of Moose [91] Creek Lodge was in January, 1951?

Mr. Taylor: Just a moment, your Honor. We are not objecting to the question as it's not who is the manager of the Moose Creek Lodge in this cause but it is as to who is the possessor of it at this time. A manager might be a hired employee.

The Court: I think you should limit it to possession—occupancy.

Q. (By Mr. Gilbert): Do you know who possessed and controlled (interrupted).

A. To my knowledge, Mr. Tommy Jones controls the Moose Creek Lodge.

Q. That was in January, 1951? A. Yes.

Mr. Taylor: If the Court please, I am going to

(Testimony of Harwell H. Jones.)

move that the answer of the witness be stricken and the jury to disregard the same as not responsive to the question, it calls for a conclusion of the witness.

The Court: Motion denied.

Mr. Gilbert: No further questions.

Cross-Examination

By Mr. Taylor:

Q. Now, Captain Jones, you stated that to your knowledge—would you please state what the basis of your knowledge [92] was that Mr. Jones was the operator and in possession of Moose Creek Lodge?

A. He introduced himself to me as the operator or the proprietor of Moose Creek Lodge sometime in February of 1950.

Q. of '50? A. That's right.

Q. And just what was the exact words in which he stated that he was the operator and manager of the Moose Creek Lodge?

A. In substance he stated that someone had broken into his house located on the Moose Creek Lodge property and had removed therefrom certain items of jewelry.

Q. That is, he at that time claimed that he had a house at Moose Creek Lodge? A. Right, sir.

Q. And from the fact that he stated that he had a house there, that you assumed then that all the buildings at the Moose Creek Lodge was under his control and in his possession?

A. That's right, sir.

(Testimony of Harwell H. Jones.)

Mr. Taylor: If the Court please, I am going to renew the objection to the answer of the witness to the previous questions and ask they be stricken.

The Court: Motion denied.

Q. (By Mr. Taylor): Is that the only information that you have to connect Mr. Jones as the operator of the Moose Creek Lodge? [93]

A. No. I have talked to Mr. Jones on several occasions relative to the operation of the lodge.

Q. And in any of those conversations, did he make a direct statement that he was the owner?

A. I don't believe he made the direct statement that he was the owner of the lodge. He showed himself as the owner of the lodge to me. He represented to me that he was the owner of the lodge.

Q. What words did he use in representing himself as the owner of the lodge?

A. I don't recall the exact words.

Q. You have assumed from something that he had said, but you don't remember now that he was the owner?

A. In my official capacity as Provost Marshal, why, we have air police who answer any kind of calls to the lodge due to conduct of military personnel and as a routine check periodically also drive by there to see if government vehicles are parked in the vicinity of the lodge and on that working basis, it is my opinion that Mr. Jones is the proprietor of Moose Creek Lodge.

Mr. Taylor: If the court please, we are going to

(Testimony of Harwell H. Jones.)

move to strike opinion testimony. There's no foundation for such an opinion.

The Court: What part do you want to move to strike? [94]

Mr. Taylor: That which is his opinion that Mr. Jones was the owner and operator of Moose Creek Lodge.

The Court: Motion denied.

Q. (By Mr. Taylor): Do you know, Captain Jones, how long Mr. Jones has resided at Moose Creek Lodge? A. I do not.

Q. Do you know whether Mr. Jones was—has been on Moose Creek Lodge since 1942?

A. I do not.

Q. When did you first learn that Mr. Jones was living at Moose Creek Lodge?

A. In February of 1950.

Q. Do you know who owns the buildings on Moose Creek Lodge, Captain Jones?

A. I do not.

Q. So your knowledge then extends as to who is operating a road house at Mile 23 on the Richardson Highway known as the Moose Creek Lodge?

A. That's correct.

Q. I take it from your answer, Captain, that you don't know who owns the buildings and improvements there?

A. No, sir; I do not know the owner. I have never seen a bill of sale or title to the property in any one's name.

Mr. Taylor: I believe that's all. [95]

Mr. Hepp: No further questions.

The Court: That's all, Captain.

(The witness left the stand.)

Mr. Gilbert: May it please your Honor, at this time I offer in evidence plaintiff's identification number four.

The Court: May be admitted.

(Mr. Gilbert proceeded to remove identification number four from the board upon which it had been exhibited for the jury.)

The Court: Why not leave it right on there?

Mr. Gilbert: All right, sir.

Clerk of the Court: Plaintiff's Exhibit "C."

(At this time, Plaintiff's Identification Number 4 was offered in evidence and marked as Plaintiff's Exhibit "C.")

Mr. McNabb: I am going to object to that as not the best evidence, no proper foundation laid, and further that there is no authority for the drawing; that it is not the best evidence; calls for a conclusion, and not material to the issues involved in this case.

The Court: Motion denied; objection [96] overruled.

Mr. Gilbert: Plaintiff rests.

Mr. Taylor: If the court please, at this time, in view of the statements—testimony of Captain Jones, I would like to renew my motion to file the amended answer in this case.

The Court: Motion denied.

Mr. Taylor: I would like to call Thomas Jones.

THOMAS A. JONES

called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Taylor:

Q. Would you state your name, please?

A. Thomas A. Jones.

Q. And where do you reside, Mr. Jones?

A. Mile 23, on the Richardson.

Q. And is there any other designation for the place that you occupy at Mile 23?

A. Well, it's the—the area is called Moose Creek Lodge.

Q. And how long have you been residing at Moose Creek Lodge, Mr. Jones?

A. Since May 5, 1947.

Q. At the time that you went onto the property, your residence at Moose Creek, who was the owner or the reputed [97] owner of the premises?

Mr. Hepp: Now, just a minute. I object to that question, your Honor. I don't know that this witness could answer that, and besides that goes to the ownership of Moose Creek and it is not set forth in the pleadings of this defendant, and I don't believe that he can go into it. It is irrelevant and immaterial. I object to it.

Mr. Taylor: If the court please, this defendant has denied in his answer that he was unlawfully on that property since 1942, and I think we can show

(Testimony of Thomas A. Jones.)

competent evidence that he was in good faith on there.

The Court: I'll sustain the objection.

Mr. Taylor: If the court please, perhaps the court didn't hear all the question. I said and—"or the reputed owner of the premises."

Mr. Hepp: I object to that "reputed owner," too.

The Court: It is not a material matter in this case at all.

Mr. Taylor: I would like to have this marked for identification.

Clerk of the Court: Defendant's identification "A."

(At this time, a lease designating Nell Kelly as lessor and Thomas A. Jones as lessee, was marked [98] for identification as Defendants' Identification "A.")

Q. (By Mr. Taylor): Mr. Jones, I hand you defendants' identification "A" and ask you to state, if you can, what that is. Will you look it over?

Mr. Hepp: Just yes or no, please.

Mr. Taylor: Just state, if you know, what that is.

The Witness: Yes.

Mr. Taylor: I think counsel should get back until I finish identifying this.

The Court: I think you should show him the paper before you question the witness about it. Show it to him first.

(Testimony of Thomas A. Jones.)

(Document handed to Mr. Hepp.)

Q. (By Mr. Taylor): What is that, Mr. Jones?

The Court: Just a minute. Don't answer, Mr. Jones.

Mr. Hepp: May it please the court, I object to any further questions concerning this identification. It doesn't appear to have any—it doesn't solve any of the material issues before this court. It doesn't bear on any of the pleadings, and—which the defendant has filed concerning Moose Creek Lodge or any arrangements surrounding [99] that, and I object to any questions as prejudicial concerning that.

The Court: May I see it?

Mr. Taylor: Yes, sir (handing document to court). I would like to make an offer of proof after the court has examined this, your Honor.

The Court: Very well; come forward and make your offer.

(The following proceedings were had out of the presence and hearing of the jury:)

Mr. Taylor: This is a lease from Nell Kelly to Thomas Jones. In the complaint it states that Thomas Jones was unlawfully withholding that land from the United States Government since 1942, and we want to show by this lease that he is on that ground under what he considered a valid lease. He went on prior to the execution of the lease, but the lease was made in 1948 and he has been holding

(Testimony of Thomas A. Jones.)

under that lease in good faith and that he had a right on the property. It is to negative the allegations that he was unlawfully on the property. I think he has a right to show it, your Honor.

Mr. Hepp: I object to that, because any claim he would have would be subordinate to the claim of the lessor. There is nothing in the pleadings that sets up any right, title or interest. Color of title doesn't mean good [100] faith in that sense at all, and there's no showing that this represents any good faith and it doesn't show that he wasn't unlawfully on there as against the true owner. I believe that this would be subordinate—certainly his possession on that ground is no better than the lessor's possession, and there's no showing that the lessor had any right, title or interest, and there's nothing in the pleadings which sets that out, and I object to that.

The Court: Objection sustained.

Mr. Taylor: I was going to make the further offer, your Honor, to back this up, by the testimony of Nell Kelly by deposition to show that she believed that she was on there under a valid homestead application on the southeast quarter of section 27, and that she was inadvertently placed on section 34 by the Bureau of Land Management under a mistaken belief because there was no survey at the time showing that. I want to show there was no unlawful—— (interrupted).

The Court: The plaintiff doesn't ask for any damages against Mr. Jones, and there's no question

(Testimony of Thomas A. Jones.)

of any set-off by reason of that. He's limited to a set-off against damages claimed, but there are no damages claimed, so your offer is denied. [101]

Mr. Taylor: The only thing I wanted to show, your Honor, is that under that lease he has spent in excess of \$50,000 in improvements; not to show that he was not unlawfully on there.

The Court: Offer is refused.

(The following proceedings were had in the presence and hearing of the jury:)

Mr. Taylor: That's all, Mr. Jones. You may take the witness.

Mr. Hepp: No questions.

The Court: That's all, Mr. Jones.

(Mr. Jones left the witness stand.)

The Court: Call your next witness.

Mr. Taylor: No more witnesses.

Mr. McNabb: We rest, your Honor.

The Court: Very well.

Mr. Hepp: At this time, we would like to make a motion out of the hearing of the jury.

The Court: The jury will remain in the hallway until called.

(At this time, the jury left the courtroom.)

Mr. Gilbert: May it please your Honor, at this time, the plaintiff moves for a directed verdict on the grounds that it has made its prima facie case. It has [102] not been controverted in no manner from the facts before the court. The plaintiff is entitled as a matter of law to a verdict.

Mr. McNabb: Your Honor, I object to the motion on the grounds that the evidence which has been produced here is not the best evidence, was not competent, and therefore the plaintiff has not made out a *prima facie* case or has not made out any case upon which relief should be granted to them. There is no authority shown on the part of any individual to make any of the maps or plats which were produced here. Those instruments were not, nor were they purported to be, originals. At no place was there an actual signature and certificate or a seal by the Commissioner of the Bureau of Land Management located in Washington and on those instruments the plaintiff in this case has attempted to prove its case. They made no showing whatever, your Honor, that any official map certified to be true and correct by the Commissioner was prepared or that it wasn't an official one prepared, and if there was, your Honor, such an official map prepared showing the exact and precise location of that lodge—and they have not produced such a map in this court—then the instruments upon which their case has been based are not the best evidence, and there is no showing in any of the instruments in this action that the requirements of the law have been complied with showing whether the [103] Moose Creek is located in a section which was withdrawn, and on grounds which is not subject to entry.

Mr. Taylor: I would like to add to that motion, your Honor, an additional ground that all the testimony in this case has shown that the northwest quarter of section 34, township 2 south, range 3

east, is in the Eilson Field Air Base. There has been no testimony of any kind or nature that section 34 lies in the flood control area as described in the complaint. We believe that's — and also there's no maps, official maps, showing—or survey—showing the actual location of the Moose Creek Lodge, and the only testimony to that is oral testimony and not supported by a competent map or survey of the area.

The Court: Motion is granted. Call the jury.

(At this time, the jury re-entered the courtroom.)

The Court: Counsel stipulate all members of the jury are present?

Mr. Gilbert: Yes, your Honor.

Mr. Hepp: We so stipulate.

The Court: Mr. Taylor, Mr. McNabb?

Mr. McNabb: Oh, yes, your Honor, we so stipulate.

The Court: Very well. Ladies and [104] gentlemen of the jury, a motion for a directed verdict has been made. The evidence in this case shows that the government is entitled to a verdict—uncontroverted. You will therefore sign the verdict which I have prepared. Mr. Johnson, I'll appoint you foreman of the jury to sign this verdict.

(The Clerk of the Court presented the verdict to Mr. Johnson, who signed as foreman.)

The Court: Verdict may be read and filed.

(Whereupon, the Clerk of the Court proceeded to read the verdict as follows:)

In the District Court for the District of
Alaska, Fourth Judicial Division
No. 6681

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELL KELLY and THOMAS JONES,

Defendants.

VERDICT

We, the Jury, duly empaneled and sworn to try the above-entitled cause, do from the law and the evidence therein, find that at the time this action was commenced, to wit: January 9, 1951, and for many years theretofore and [105] at all times thereafter, the plaintiff was and is the owner in fee simple and entitled to the immediate possession of the property described in the complaint herein, to wit: NW $\frac{1}{4}$, Section 34, Township 2 South, Range 3 East, Fairbanks Meridian, Alaska.

Dated at Fairbanks, Alaska, this 27th day of April, 1951.

/s/ ERNEST JOHNSON,
Foreman.

The Court: The jury is excused until 10 a.m. on the 2nd of May.

(At 2:55 p.m., the trial of this cause was concluded.)

United States of America,
Territory of Alaska—ss.

I, Charles Belida, Official Court Reporter for the above-named court, do hereby certify as follows, to wit:

That I attended all court proceedings had in the above-named cause and that I reported in shorthand all of the oral proceedings had in said cause;

That the preceding pages, numbered 1 through 106, both inclusive, constitute a full, true, complete and accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 7th day of May, 1951.

/s/ CHARLES BELIDA,
Official Court Reporter.

[Endorsed]: Filed June 7, 1951. [106]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings as per Designation of Record by Appellants in the above-entitled cause, viz.:

	Page
1. Complaint in Ejectment	1
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29. Brown Manila Envelope Containing Exhibits.

Witness my hand and the seal of the above-entitled Court, this 11th day of July, 1951.

[Seal] /s/ JOHN B. HALL,
Clerk of the District Court, Fourth Judicial Division,
Territory of Alaska.

[Endorsed]: No. 13013. United States Court of Appeals for the Ninth Circuit. Thomas Jones, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Judicial Division.

Filed July 16, 1951.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13013

THOMAS JONES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

The appellant states that the points upon which he intends to rely on this appeal are as follows:

1. That the Court erred in overruling objections at pages 13, 28, 29, 30, 31, 32, 37, 38, 40, 42, 43, 44, 46, 47, 48, and 96 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

2. That the Court erred in denying motions to strike testimony at pages 32, 60, 92 and 93 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

3. That the Court erred in denying offers to prove at pages 73, 74, 76, 77, 100 and 101 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

4. That the Court erred in denying the defendant Jones' Motions to File Amended Answer at pages 81, 87 and 97 of the Transcript of Trial as

numbered by the official Court Reporter of the District Court.

5. That the Court erred in granting plaintiff's Motion for Directed Verdict at page 104 of the Transcript of Trial as numbered by the official Court Reporter of the District Court.

/s/ WARREN A. TAYLOR,
Attorney for Appellant,
Thomas Jones.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

The appellant hereby designates, by reference to
the pages of the original certified record, the fol-
lowing portions of said record which are material
to the consideration of this appeal:

Complaint in EjectmentP. 1- 2
Answer of Defendant JonesP. 3
Answer of Defendant KellyP. 4
Lodged Amended Answer (Motion to file
same denied)P. 21-23
VerdictP. 23
JudgmentP. 24-25
Notice of AppealP. 31
Designation of RecordP. 34
Entire Reporter's Transcript of Trial.
All the Exhibits admitted in evidence at the trial
and the identifications offered.
Certificate of Clerk.

/s/ WARREN A. TAYLOR,
Attorney for Appellant,
Thomas Jones.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1951.

